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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

STATE OF OREGON,
Respondent.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Supremacy Clause of the U.S. Constitution required the Oregon Court of Appeals to apply controlling new case law from this Court, *i.e., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); and *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003), to Petitioner's pending federal constitutional takings claims or whether the lower court was free to ignore those decisions based upon the "law of the case" doctrine.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10 percent or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Boise Cascade Corporation ("Petitioner" or "Boise Cascade") respectfully petitions for a writ of certiorari to review a judgment of the Oregon Court of Appeals.

OPINIONS BELOW

The decision of the Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry*, is reported in 63 P.3d 598 (Or. Ct. App. 2003) ("*Boise V*") and is reproduced as Appendix A ("App. A"). The Oregon Supreme Court's July 29, 2003 order denying Petitioner's petition for review (SC S50346) is reproduced as Appendix B ("App. B"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018), dated September 3, 2001, granting the State of Oregon (the "State") summary judgment on its ripeness defense is reproduced as Appendix C ("App. C"). The Oregon Court of Appeals' 1999 opinion in this case is reported in 991 P.2d 563 (Or. Ct. App. 1999) ("*Boise IV*"), and is reproduced as Appendix D ("App. D"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018), dated October 16, 1997, denying Petitioner summary judgment on its possessory takings claim based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982), and granting summary judgment on the issue of liability on its regulatory takings claim based on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is reproduced as Appendix E ("App. E"). The jury verdict finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues is reproduced as Appendix F ("App. F"). The circuit court's judgment is reproduced as Appendix G ("App. G").

Before the trial, there was another set of appeals after the case originally had been dismissed by the Clatsop County Circuit Court. The Oregon Court of Appeals' opinion on the prior appeal, which reversed the trial court, is reported in *Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. Ct. App. 1994), and is reproduced as Appendix H

("App. H"). [1] In that instance, at the State's request, the Oregon Supreme Court granted review and affirmed in part and reversed in part the court of appeals. The Oregon Supreme Court's opinion is reported in 935 P.2d 411 (Or. 1997) and is reproduced as Appendix I ("App. I").

STATEMENT OF JURISDICTION

The order of the Oregon Supreme Court denying Petitioner's petition for review of the decision of the Oregon Court of Appeals was issued on July 29, 2003. (App. B.) The appellate judgment was entered on September 17, 2003 and is reproduced as Appendix J ("App. J"). This petition is being timely filed within 90 days of entry of that judgment. 28 U.S.C.A. § 2101(c) (West 1994). The Court has jurisdiction in this matter pursuant to 28 U.S.C.A. § 1257(a) (West 1993), because the Oregon regulatory scheme as enforced by the Oregon courts is repugnant to the Supremacy Clause and the Fifth and Fourteenth Amendments to the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions at issue in this case are (1) the Supremacy Clause, which provides: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Const. art. VI; and (2) the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation," U.S. Const. amend. V. The Takings Clause is made applicable to the states through (3) the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of

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[1] A parallel appeal concerning the validity of the Board of Forestry's (the "BOF") decision denying Petitioner the right to harvest the subject timber is reported in *Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1041 (Or. Ct. App. 1994), *aff'd*, 935 P.2d 422 (Or. 1997).

life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

Petitioner was prohibited from harvesting timber on its property based upon Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site . . . .
>
> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. . . .
>
> . . . .
>
> (5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This rule is reproduced in its entirety as Appendix K ("App. K"). Also involved are Oregon Administrative Rules 629-680-0000 (2000), formerly 629-056-0010; 629-680-0010(5) (2000), formerly 629-056-0020(5); 629-680-0100(1) (2000), formerly 629-056-0100(1); and 629-680-0220 (2000), formerly 629-056-0220, which declare, define and together provide for the protection of such sites as public resources. Each of these rules is reproduced in Appendices L through O, respectively ("App. L," "App. M," "App. N," "App. O").

The U.S. Fish & Wildlife Service (the "USF&WS") is authorized to issue an Incidental Take Permit ("ITP") for the "taking" of a threatened species under section 9 of the Endangered Species Act (the "ESA"), 16 U.S.C.A. § 1539 (West 1985 & Supp. 2000).

STATEMENT OF THE CASE

A. Procedural History.

In June 1990, the USF&WS indicated it intended to list the northern spotted owl as a threatened species under the ESA. On July 23, 1990, that listing took effect. 55 Fed. Reg. 26,114 (June 26, 1990). At the same time, the USF&WS issued *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* (the "Procedures"), requiring the preservation of 70 acres of timber around all northern spotted owl nest sites. A copy of the Procedures is reproduced as Appendix P ("App. P").

Based on the Procedures, the BOF adopted former Oregon Administrative Rule 629-024-0809(1) and (2) (now renumbered at 629-665-0210(1) and (2) (2000) (*see* App. K)), requiring private landowners to protect a 70-acre area around a nest site or an activity center "occupied by an adult pair of spotted owls, capable of breeding." Or. Admin. R. 629-665-0210(2).

Before the time the owls were listed, Petitioner had in 1988 acquired a 65-acre parcel of timber as a part of a land trade with another forest products company. That parcel is known

as the Walker Creek Unit (the "Unit"). (App. H, 886 P.2d at 1035.) In 1989, Petitioner cleared a road into the Unit in anticipation of full-scale logging of the timber the following year. However, when the owls were listed in 1990, Petitioner stopped cutting trees in the Unit, because a pair of spotted owls had been found nesting there. (App. H, 886 P.2d at 1036.)

In February 1992, Petitioner filed in compliance with Oregon law a written plan with the Oregon State Forester (the "State Forester"), seeking permission to harvest the subject timber. (App. H, 886 P.2d at 1036.) That plan was denied by the State Forester based on Oregon Administrative Rule 629-665-0210. The State Forester indicated that Petitioner needed to protect approximately 56 acres of timber on its land as spotted owl nesting habitat (the other 14 acres comprising the protected habitat were on adjacent lands owned by the State and another private landowner). On May 5, 1992, Petitioner submitted an amended plan that was also denied, because Petitioner refused to acquiesce in designating 56 acres of its land as a public resource as an owl nesting site. (App. H, 886 P.2d at 1036.) It then appealed that denial to the BOF, which affirmed the State Forester's denial of the plan in a Final Order on January 15, 1993, a copy of which is reproduced as Appendix Q. Petitioner then sought review of the agency's order by the Oregon Court of Appeals, which affirmed the BOF's Final Order on December 7, 1994. (App. H, 886 P.2d at 1041.) That order was then also affirmed by the Oregon Supreme Court on April 10, 1997. (App. I, 935 P.2d 411.)

B. The Case.

After the BOF issued its Final Order in January 1993, Petitioner commenced an inverse condemnation action against the State in Clatsop County Circuit Court, alleging a "taking" of its timber under the Fifth Amendment to the U.S. Constitution and a similar provision in the Oregon Constitution. The State then filed a motion to dismiss on

various grounds, including that Petitioner had failed to allege facts sufficient to state a claim under the Fifth Amendment. The circuit court granted the State's motion on all grounds, and Petitioner appealed to the Oregon Court of Appeals.

The court of appeals reversed on all grounds, holding that valid takings claims were alleged under both the Fifth Amendment and the Oregon Constitution. (App. H, 886 P.2d 1033.) The State then sought review by the Oregon Supreme Court, which was granted. The Oregon Supreme Court affirmed that Petitioner had alleged a valid takings claim for the 56 acres of timber it had been prevented from logging. The court reversed as to a temporary takings claim, involving four acres located outside the protected nesting site, that Petitioner had been delayed in harvesting because of a temporal restriction. (App. I, 935 P.2d at 411, 420 n.14.) The court remanded the case to the circuit court for trial. (App. I.)[2]

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[2] While the first appeal was pending, on February 17, 1995, the USF&WS issued a Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9484 (Feb. 17, 1995), reproduced, in part, as Appendix R ("App. R"). That proposed rule indicates that at the time the northern spotted owl was listed in 1990 as a "threatened species" under the ESA, the USF&WS had at that time instituted a "blanket prohibition against incidental take of spotted owls." *Id.* at 9484; *see also id.* at 9490. (*See also* App. O.) The special rule that the USF&WS was proposing in February 1995 would have for the first time allowed for the issuance of IPTs to private landowners in the states of California and Washington, because those states had adopted rules that protected owl habitat beyond the 70-acre nesting site. However, because the Oregon Department of Forestry rule, which is the subject of this case, protected only the 70-acre nesting site, the USF&WS excluded the possibility of issuing IPTs to private timber owners in Oregon. *Id.* at 9489-90. Even in the states of California and Washington, the USF&WS indicated that the 70 acres closest to the nesting site would still remain protected. *Id.* at 9506 (Table 1). Therefore, the USF&WS certainly would not have issued Petitioner an ITP in 1993, when it sought the

After the case was remanded by the Oregon Supreme Court in 1997 for trial, Petitioner filed an amended complaint that separated its claim based on the Fifth Amendment into two counts. The first was a physical occupation theory based on *Loretto*, and the second was a regulatory takings theory based on *Lucas*. Petitioner then moved for summary judgment as to the issue of liability on both counts of its federal claim. (App. A, 991 P.2d at 563, 569.)

On October 15, 1997, the Oregon Department of Forestry informed Petitioner by letter that "[o]f the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at [another] site more than eight miles away." The letter is reproduced as Appendix S ("App. S"). *See also* 991 P.2d at 565. The letter went on to inform Petitioner that the State considered the nest site to be no longer protected under Oregon law, but suggested Petitioner consult with the USF&WS because that agency might consider the site to still be protected under the ESA. (App. S.) The following day, the circuit court issued a letter opinion granting Petitioner summary judgment on its *Lucas* count and denying it summary judgment on its *Loretto* count. (App. E.) (*See* App. D, 991 P.2d at 565.)

Petitioner then filed a Supplemental Complaint alleging a temporary taking for the almost five years that it had been denied the right to harvest the 56 acres of timber because of the Oregon regulation. At the conclusion of the trial, the circuit court submitted the issue of liability as to Petitioner's *Loretto* count to the jury. A unanimous jury found that "plaintiff Boise Cascade Corporation [was] required to submit to a physical occupation of its property as a result of the Board of Forestry's order." (App. F.) It also made findings as to the fair market value of the timber both at the

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State's approval to harvest the subject timber that was within the 70-acre nesting site and included the nest tree that had been occupied annually by owls since at least 1990.

time the Final Order was entered denying Petitioner the right to harvest the timber and the date the State declared the site to have been abandoned by the owls. (*Id.*) As a result of those findings, a judgment was entered in the amount of $1,820,059, including interest from the date of the taking (the court of appeals' opinion incorrectly states that the judgment was for $2,279,223). (App. A, 991 P.2d at 565.) A copy of that judgment is reproduced as Appendix T.

The State appealed. The Oregon Court of Appeals reversed the judgment, holding that Petitioner could not state a claim for the occupation of its land, for a physical taking based upon *Loretto*, because "[t]he State has no control over where spotted owls choose to nest." (App. A, 991 P.2d at 570.) It also reversed the summary judgment on the count based on *Lucas*. The court held that Petitioner's regulatory takings claim might not be "ripe" for adjudication because there was the possibility that if Petitioner had applied to the USF&WS for an ITP and one had been granted, the BOF could have exercised its discretion under Oregon Administrative Rule 629-665-0210(5) (2000) to approve Petitioner's logging plan. The Oregon Supreme Court then denied review, 18 P.3d 1099 (2000), and this Court denied certiorari, 532 U.S. 923 (2001).

After the case had again been remanded to the trial court, this Court decided *Palazzolo*, 533 U.S. 606, on June 28, 2001. Based upon this Court's holdings that a regulatory takings case is ripe when "the permissible uses of the property are known to a reasonable degree of certainty" and that the landowner was not required to submit "further and futile applications with other agencies," Petitioner moved for summary judgment on the State's "ripeness" defense. [3] *Id.* at

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[3] This Court also again stated that "[g]overnment . . . may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Id.* at 621 (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999)).

620, 626. Petitioner argued that the court of appeals had been wrong in holding that in order to satisfy ripeness Petitioner needed to show that it would have been futile to seek an ITP from the USF&WS before this action was commenced in 1993.[4] In rejecting Petitioner's argument the trial court stated:

> The Oregon Court of Appeals' 1999 opinion cited *Williamson* and other cases discussed in *Palazzolo*. Given the court of appeals' interpretation of *Williamson*, it is unlikely it would decide this case differently after *Palazzolo*.

(App. C.)

The trial court instead granted the State summary judgment on the issue of ripeness on the basis that Petitioner was estopped or precluded from demonstrating futility because it did not litigate that issue in the administrative proceeding before the BOF. (*Id.*; App. A, 63 P.3d at 602.)

On appeal, the court of appeals reversed the trial court's summary judgment in favor of the State on the grounds that it had not properly raised the defense of estoppel or issue preclusion that would bar Petitioner from showing it would have been futile to try to obtain an ITP from the USF&WS. It also held that the evidence that Petitioner had submitted in support of its cross-motion for summary judgment was

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[4] In support of its motion for summary judgment after the case was remanded in 1999, Petitioner put forward evidence that it would have been futile to try to obtain an ITP from the USF&WS. (App. A, 63 P.3d at 603-06.) However, at that time, Petitioner was not aware of the USF&WS' 1995 Proposed Special Rule that indicated the agency would not issue an ITP for spotted owls on private lands in Oregon, and even in Washington and California it would not issue any for habitat involving the 70 acres closest to the nesting site. 60 Fed. Reg. 9484. That document was discovered while the petition for review was pending before the Oregon Supreme Court and was promptly brought to the court's attention. (App. R.)

insufficient to show futility.[5] The court of appeals then remanded the case again to the trial court to allow the parties to present further evidence on the futility issue, holding,

> where there remains an unexplored *possibility* under the regulations in question that development can occur, a claim is not ripe and the "futility" exception will not apply unless the party claiming futility can show that there was very little likelihood—or no likelihood—that the development would have been approved had that party taken further steps to obtain approval.

(App. A, 63 P.3d at 605 (emphasis in original).)

The Oregon Supreme Court then denied Petitioner's Petition for Review of the court of appeals' decision. (App. B.)

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case the decision was rendered by a lower appellate court and the state court of last resort refused to grant review. (App. C.) Under Rule 10(c), a ground for review exists when a state court has decided an important

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[5] As to the likelihood that the USF&WS would have issued Petitioner an ITP when the owls were actually nesting in the subject timber, the court below held that it was irrelevant that the federal government obtained an injunction against the Petitioner from harvesting the subject timber after the State had declared the nesting site to have been abandoned because the female owl had died and the male had found a new mate and was nesting several miles away. (App. A, 63 P.3d at 605); *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003). The USF&WS sought the injunction on the basis that other spotted owls might in the future nest there, even though no owls were presently nesting there that could be "harmed" under the ESA. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-706 (1995).

question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

A. The Supremacy Clause of the U.S. Constitution Required the Oregon Court of Appeals to Consider and Apply All Decisions of This Court Pertaining to the Federal Issues in This Appeal.

In its 1999 opinion in *Boise IV*, 991 P.2d at 569-73, the Oregon Court of Appeals decided two federal constitutional issues—ripeness of Petitioner's regulatory takings claim and the elements of a physical taking—that were addressed in subsequent decisions of this Court in *Palazzolo* (ripeness); *Tahoe*, 535 U.S. 302 (defining distinction between regulatory and physical taking); and *Brown*, 123 S. Ct. 1406 (which also involved physical taking). Petitioner brought these decisions to the attention of the Oregon Court of Appeals and the Oregon Supreme Court and sought reconsideration of the 1999 *Boise IV* decision based upon those decisions. (*See* [Boise Cascade's] Motion to Reconsider Court's Prior Opinion in This Case Based upon a Recent U.S. Supreme Court Decision That Is Controlling, Which Overrules This Court's Earlier Dictum (CA A115966) (reproduced as Appendix U; *see also* [Boise Cascade's] Petition for Review (CA 226966) (reproduced as Appendix V)).)

The court of appeals rejected reconsidering its earlier decision as to those two issues based upon the "law of the case" doctrine, even though the Supremacy Clause makes the decisions of this Court binding upon all pending cases. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816).[6] (App. A, 63 P.3d at 601; Order Denying Motion to Reconsider Prior Opinion (CA

[6] These cases were also brought to the court of appeals' attention in Plaintiffs'/Appellant's Reply Brief and Petitioner's Petition for Review to the Oregon Supreme Court.

A115966) (reproduced as Appendix W ("App. W")).) The court of appeals in *Boise V* did refer to both *Palazzolo* and *Tahoe* for other propositions of law that are not relevant to the issues raised by this Petition. (App. A, 63 P.3d at 600 n.1, 604.)

1. The Court of Appeals Improperly Refused to Apply *Palazzolo* on the Issue of Ripeness and Futility.

In *Boise IV* the court of appeals held that Petitioner's federal constitutional regulatory takings claim based on *Lucas* was not ripe, because Petitioner had failed to seek an ITP from the USF&WS after the BOF had issued a Final Order denying Petitioner's written plan to harvest the subject timber. Imposing a judicially created barrier to the assertion of plaintiff's Fifth Amendment rights, the court of appeals ruled that an ITP application was required unless it would have been futile to seek one. (App. D, 991 P.2d at 571-72; *see also* App. A, 63 P.3d at 601 (holding same and relying without further discussion on *Boise IV*).) The court's holding was clearly erroneous, because even if the USF&WS had granted Petitioner an ITP, the BOF at all times retained *plenary discretion* as to whether it should reconsider its enforcement of *state regulations* when an ITP had been granted by the federal government. The subject regulation states:

> Exceptions to the [Oregon state regulatory] requirements for protecting northern spotted owl nesting sites *may* be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

Or. Admin. R. 629-665-0210(5) (formerly Or. Admin. R. 660-024-0809(5)) (emphasis added).[7]

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[7] The sole purpose of subsection 5 is to insulate the State from any takings claims, because the BOF knew the USF&WS would

There is no ambiguity in that regulation. The existence of an ITP is merely something that the BOF may consider as a collateral matter. The regulation does not even require the BOF to give consideration to an ITP when enforcing state regulations. The BOF's discretion on the issue is unfettered. This Court should grant certiorari because the court of appeals was informed of the *Palazzolo* decision and failed to apply it properly in *Boise V.* Specifically, the court of appeals (1) refused outright to even reconsider whether ripeness was a viable defense for the State in the first instance, and (2) then misapplied *Palazzolo* in reaching its conclusion that there was an issue of fact as to whether an application for an ITP would have been futile.

In *Palazzolo* the owner of a waterfront parcel containing wetlands sued the Rhode Island Coastal Resources Council ("RICRC"), an agency empowered by state law to promulgate and enforce regulations to protect and preserve property along the Rhode Island coastline. RICRC enforced its regulations, denying a number of development plans submitted by the plaintiff, who eventually brought an inverse condemnation action for a Fifth Amendment regulatory taking. The Rhode Island Supreme Court ruled in favor of the state, holding that

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not issue an ITP that would allow a landowner to harvest the 70 acres of timber that was closest to the nesting site. (Apps. P, R.) By requiring the landowner to seek an ITP, the BOF could argue that it had not fully exercised its discretion until the USF&WS had issued one, even though nothing in the ESA requires a landowner to apply for an ITP. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000). An ITP is merely a safe harbor provision that, if granted, protects the landowner against any civil or criminal liability under the ESA. The State also took the position that if the USF&WS indicated that an ITP was not required, it would not be sufficient to satisfy the BOF. 991 P.2d at 573-74. Thus the intent of the regulation was to force the landowner to seek an ITP that the State knew the USF&WS would not issue, so that the BOF could always argue it had not exercised its full discretion under this section, and thus assert that a takings claim was not yet ripe.

the plaintiff's claim was not ripe, even though RICRC had repeatedly denied him a development permit, because he had not sought a permit from the Rhode Island Department of Environmental Management and the local municipality. 533 U.S. at 624. This Court reversed, holding that the Takings Clause of the Fifth Amendment does not allow state governments to impose "repetitive or unfair land-use procedures in order to avoid a final decision." *Id.* at 621. In rejecting the government's claim that the failure to seek approval from agencies other than RICRC made the claim unripe, this Court held that "federal ripeness rules do not require the submission of further and futile applications with other agencies." *Id.* at 626.[8]

The holding in *Palazzolo* was brought to the attention of the court of appeals during the briefing of *Boise V* with a request that the court reconsider its holding in *Boise IV* that ripeness was a viable defense, absent futility. The court of appeals rejected this out of hand in *Boise V*:

> Most of Boise's arguments in support of summary judgment were to the effect that this court's decision concerning ripeness and futility in *Boise IV* was wrong. The trial court rejected those arguments and, to the extent that Boise repeats them at great length on this appeal, we reject them without further discussion. *See generally State v. Pratt*, 316 Or. 561, 569, 853 P.2d 827 (1993) (under the law of the case doctrine, "when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the

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[8] The court of appeals in *Boise IV* had ignored a similar statement by the Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (App. D, 991 P.2d at 571-74; *see also* Respondent's Brief in *Boise IV* at 25-26).

> same litigation and upon the appellate court itself in any subsequent appeal").

(App. A, 63 P.3d at 601.)

Accentuating its refusal even to consider Petitioner's request that its claims should be reevaluated in light of new U.S. Supreme Court precedent, the court of appeals later stated:

> As noted above, we summarily reject Boise's attempts to relitigate the issue decided in the previous appeal concerning the availability of the ripeness defense, thus disposing of the majority of the arguments Boise asserts in this appeal.

(App. A, *id.* at 601-02.)

The court of appeals ruled only as to whether Petitioner's motion for summary judgment on futility should be granted. It erred in affirming the circuit court's denial of that motion, because it incorrectly evaluated the issue as one calling for a particular quantum of proof that Petitioner would have been granted an ITP by the USF&WS. (App. A, *id.* at 603-05.) That missed the central point of plaintiff's motion—that an ITP has no authoritative effect upon the BOF and the state laws and regulations it enforced against Petitioner to cause the taking. *New York v. United States*, 505 U.S. 144 (1992).[9] The taking occurred as a result of a state agency enforcing state laws and state regulations that could neither be reversed nor modified by any ITP Petitioner might have obtained, because the BOF at all times retained plenary discretion to simply disregard an ITP. (App. K, Or. Admin. R. 629-665-0210(5) (formerly Or. Admin. R. 660-024-0809(5)).)

The State can ban logging, and then prohibit the assertion of the federal constitutional right to just compensation by

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[9] *See* note 6, *supra*. The State took the position that its regulation must be given effect to protect the nesting site, even if the USF&WS indicated that an ITP was not necessary. (App. D, 991 P.2d at 573-74.)

sending the plaintiff first to the federal government for a permit that the BOF may then ignore. *Palazzolo* bars this sort of administrative legerdemain as a matter of federal constitutional law. 533 U.S. at 626 (citing *Felder v. Casey*, 487 U.S. 131, 150-51 (1988)). The Fifth Amendment rights of property owners cannot be impeded by states in requiring landowners to apply for permits that cannot provide the landowners with the ability to affect the state agency's decision to take the property.

2. The Court of Appeals Improperly Refused to Reconsider Its Prior Ruling on Boise Cascade's Claim for a Physical Occupation Taking.

After the case had been briefed in the court of appeals and before it was argued, this Court decided *Tahoe* in April 2002. A second holding of the court of appeals in *Boise IV* was that Boise Cascade could not base its claim on a physical taking theory.[10] (App. D, 991 P.2d at 569-70; *see also* App. A, 63 P.3d at 600.) The court had held that a physical taking theory was inappropriate because "[t]he state has no control over where spotted owls choose to nest." (App. D, 991 P.2d at 570.) The court went on to hold that in order to prevail, Boise Cascade must proceed on a regulatory theory, which also involved the issue of ripeness discussed above.

In *Tahoe* this Court laid down a bright-line test for distinguishing between a physical taking and a regulatory taking. 535 U.S. at 324 n.19. First, a physical taking gives the government a right to use the property for a public purpose, while a regulatory taking "does not give the government any right to use the property." *Id.* Second, a physical taking affects the right of the property owner to

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[10] A unanimous jury had found that Boise Cascade had been required to submit to a physical occupation of its property as a result of the BOF's order denying its written plan to log the subject property. (*See* App. D, 991 P.2d at 565; *see also* App. A, 63 P.3d at 600.)

exclude others from using its property, while a regulatory taking does not. *Id.* Contrary to the court's holding in *Boise IV*, control over the occupant is not a factor in a physical taking analysis.[11] In this case the State has asserted both the right to use Petitioner's property for a public purpose and denied it the right to exclude the owls by harvesting their nesting site or doing anything else that might cause them to leave the nesting site.[12]

Petitioner brought the *Tahoe* opinion to the attention of the court of appeals and moved the court to reconsider its holding as to the physical takings issue in light of that decision. (App. U.)

On July 1, 2002, before oral argument, the court issued an order stating:

> Appellant has moved for reconsideration of a portion of the court's decision disposing of a previous appeal in the same trial court case. The motion is denied on the ground that this court's prior decision is final and may not be altered by way of a motion filed in a subsequent appeal.

(App. X.)

The "law of the case" doctrine upon which the court of appeals relied in refusing to reconsider its *Boise IV* decision in light of this Court's subsequent decisions in *Palazzolo* and *Tahoe* is not an absolute rule, but one based upon policy reasons that do not apply when a subsequent ruling by a

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[11] The government had no control over the company that installed the cable television box in *Loretto*. The city of New York merely authorized the company to install it against the wishes of that property owner. 458 U.S. at 432 n.9. (App. K.) Nor did the government have any control over the occupants of boats that wished to use the plaintiff's private pond in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[12] The regulation that is the subject of this action, Oregon Administrative Rule 629-665-0210(1)(b) (2000), prevents the property owner from conducting any activities that might cause the "owls to flush" from the nesting site. (App. K.)

higher court shows that the court's earlier decision was in error. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739-40 (D.C. Cir.), *cert. denied*, 516 U.S. 865 (1995).

Moreover, under the Supremacy Clause of the U.S. Constitution, once this Court decides a federal constitutional question it becomes the law of the land and all state courts are required to follow that holding in all pending cases. *Cooper*, 358 U.S. at 18; *Martin*, 14 U.S. (1 Wheat) 304. Moreover, a state court's refusal to consider a federal issue under "law of the case" doctrine does not limit this Court's ability to review the question. *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997).

After the court of appeals refused to reconsider either of its prior holdings based upon *Palazzolo* and *Tahoe*, Petitioner petitioned the Oregon Supreme Court to review the decision pursuant to the Supremacy Clause of the U.S. Constitution. While that petition was pending, this Court decided *Brown*, 123 S. Ct. 1406, on March 26, 2003, which Petitioner promptly brought to that court's attention. (App. V.)

In *Brown* this Court again revisited the issue of whether a taking was a regulatory one or a per se physical taking. *Brown* involved the issue of whether using interest on lawyers' trust accounts ("IOLTA") to provide funds to support legal aid programs constituted a taking.

Below, the Ninth Circuit en banc majority had analyzed the case based upon the ad hoc regulatory taking reasoning stated by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Brown*, 123 S. Ct. at 1416. The Ninth Circuit dissenters argued that there had been a per se physical taking based upon *Loretto*, 458 U.S. 419, and *United States v. Causby*, 328 U.S. 256 (1946). *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 865 (9th Cir. 2001). As the dissenters noted, this Court has never used a regulatory takings analysis when government has actually used the property in question for its own purposes. *Id.* at 865-66. This Court agreed with the Ninth Circuit's dissenters and

held that because the IOLTA trust funds were being used for a public purpose, there had been a per se physical taking. *Brown*, 123 S. Ct. at 1417-19. In support of its position that the IOLTA claim involved a physical taking and not a regulatory taking, this Court quoted at length from its opinion in *Tahoe*. *Id.*

In *Brown*, the government had no control over where the lawyers chose to deposit trust funds. Nor did it have any control over whether the lawyers would choose to deposit them in non-interest-bearing trust accounts, which would make them subject to IOLTA, or in interest-bearing trust accounts in which the interest would go to their clients rather than IOLTA. *Id.* at 1413.

In *Brown*, the state merely authorized that interest accrued on non-interest-bearing trust accounts be used for a public purpose. In *Loretto*, the government had merely authorized a television cable equipment company to install its equipment on private apartment buildings of the company's choosing. Authorization by government, and not control by it, has always been sufficient to constitute a physical taking. *Loretto*, 458 U.S. at 432 n.9.

a. Under a Physical Occupation Theory, the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control over It.

The court below shifted the focus of this Court's physical takings jurisprudence from the issue of whether there had been a forced occupation authorized by government, to whether government had control over the occupant, which this Court has never deemed to be the determining factor. *Id.*; *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992). In a physical takings case, the key issue is whether the landowner has the right to exclude the government-authorized occupant and has been forced to acquiesce to the occupation. *Yee*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176. Due to the ESA and state regulations that impose similar wildlife

servitudes, there are a growing number of cases in which government has imposed wildlife servitudes. In *Lucas* this Court stated:

> On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

505 U.S. at 1018.

A number of persons in academia are urging courts to ignore established principles of property law in order to protect wildlife. They argue that this Court has taken an anachronistic approach to takings cases involving natural habitat, based upon an archaic view of property rights that must change in order to save the environment. James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); *see also* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1988); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1445 (1993); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 105-06 (1995); Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things That Go Bump in the Night*, 85 Iowa L. Rev. 849, 886-87 (2000); Melinda Harm Benson, *The* Tulare *Case: Water*

Rights, the Endangered Species Act, and the Fifth Amendment, 32 Envtl. L. 551, 555-56 (2002); Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. Envtl. Aff. L. Rev. 357, 360-74 (1996); Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 Iowa L. Rev. 297, 317 (1995); John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 Tul. Envtl. L. J. 331 (2003).

See also Eric T. Freyfogle, *The Land We Share: Private Property and the Common Good* at 234-38 (2003). Although Professor Freyfogle argues that the protection of wildlife should trump the right of private landowners to make economic use of their property, he does recognize that the ESA and similar state laws impose "burdens [that] can be severe—as when the act bans all construction or tells landowners they cannot harvest their trees—and the act does seem to strike like lightning, applying only to the tiny percentage of landowners whose land includes designated critical habitat." *Id.* at 237.[13] However, his solution is not to compensate those landowners who have been singled out to bear such burdens, but rather "to protect wildlife better and make the law fairer, the idea embedded in the [ESA] must be expanded to include more species and more habitat types." Freyfogle, *supra*, at 237.

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[13] As another scholar has stated: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reciprocity of advantage, the ESA [and state regulations such as the subject one based upon it] burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

The current trend of the lower courts is to implicitly adopt this view and refuse to find a taking and award compensation. In addition to *Boise IV*, see *Boise Cascade*, 296 F.3d at 1354, in which the Federal Circuit adopted the reasoning of the Oregon court. *See also Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (compare opinion of Justice White dissenting from denial of certiorari); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994). In *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993), the California Supreme Court affirmed the lower court, 876 P.2d 505 (Cal. 1994), but omitted any discussion of the takings issue and took the extraordinary step of directing that the lower court's opinion not be published in the official reports. No. S037820, 1994 Cal. LEXIS 1388 (Cal. Mar. 18, 1994).

Earlier cases recognized that if government required private landowners to set aside wildlife habitat for public use, they had to be compensated for it. *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) ("If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, ... it must acquire some proprietary interest in the areas suitable for such uses."); *State v. Herwig*, 117 N.W.2d 335, 340 (Wis. 1962) (holding that in order to protect bird nesting habitat on private land "the state should acquire whatever rights or easements are needed by purchase, lease or condemnation"); *Shellnut v. Ark. State Game & Fish Comm'n*, 258 S.W.2d 570, 574 (Ark. 1953) (taking of private property for wildlife refuge required compensation).

Even this Court's decisions in *Kaiser Aetna*, *Loretto* and *Yee*, which have clearly held the right to exclude is the keystone of a physical taking, have not had much effect on the lower courts when wildlife protection is the issue. In cases such as *Southview Associates, Ltd. v. Bongartz*, 980

F.2d 84 (2d. Cir. 1992), and *Moerman v. State*, 21 Cal. Rptr. 329 (Cal. Ct. App. 1993), the courts simply ignored that private property was being put to a public use of providing wildlife habitat and instead held that there had been no taking, because the landowners had at least a theoretical ability to exclude large wild mammals by fencing their lands. *Southview* involved deer and *Moerman* involved elk, and the courts in those cases held that because the landowners had the right to exclude such animals, there had been no physical taking under *Kaiser Aetna*, *Loretto* and *Yee*.

However, since even legal fictions must at least be plausible, a theoretical right to exclude wildlife could not provide a rationale in cases involving spotted owls, because they, like other birds, cannot be fenced out from private lands. Thus the court below had to ignore the hallmarks of a physical taking: not only that Petitioner's timber was being used for a public purpose of providing spotted owl habitat, but also that Petitioner was prevented from taking any action to exclude the birds from its property. *See Tahoe*, 535 U.S. at 324 n.19. Instead, the court below invented a new rationale to support its decision, *i.e.*, the government did not have control over the birds, although it was asserting complete control over how the subject timber was to be used for the owls' benefit.

Here, the subject regulation goes beyond merely regulating the use of Petitioner's land by requiring that Petitioner use it for only one purpose, which is a public purpose. *Yee*, 503 U.S. at 522-23. It prohibits Petitioner from conducting any activity on its property that "cause[s the] owls to flush from the nesting site." Or. Admin. R. 629-665-0210(1)(b). Petitioner had no choice under the subject regulation but to acquiesce to the occupation of its timber as a nesting site. 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)). Petitioner was prevented by the subject regulation from harvesting its

timber or doing anything that could cause the birds to "flush from the nesting site." The State consequently exerted as much control over Petitioner's property as if it had acquired a formal easement for bird nesting habitat. Or. Admin. R. 629-665-0210(1)(b); *cf. North Dakota v. United States*, 460 U.S. 300 (1983). Petitioner was prevented from excluding the owls from its property, so that the property could be used for a public purpose.

b. A State May Not Require a Landowner to Obtain a Permit from a Federal Agency in Order to Satisfy "Ripeness," When the State Has No Obligation to Issue Its Own Permit, Even if the Federal Permit Is Granted.

The second important issue involves satisfying the ripeness requirement before adjudicating a regulatory takings claim. If the decision below is left to stand, a state administrative agency can avoid making a final decision satisfying ripeness by unfairly requiring a landowner to pursue a collateral approval from a federal agency that has no authority to either approve or disapprove the landowner's logging plan, and that is on record that it will not issue an ITP that would involve harvesting the timber on the 70 acres closest to the nesting site. (Apps. P, R.) In this case, even if Petitioner had obtained an ITP from the USF&WS, the state agency was under no obligation under Oregon law to exercise its discretion so as to approve Petitioner's logging plan.

In arguing that Petitioner's claim was not ripe until Petitioner had sought an ITP from the USF&WS, the State was not claiming that it might approve some different plan than the one previously submitted. Any new plan would involve a request to harvest the same 56 acres of timber that was the subject of the request that had been denied in the BOF's Final Order.

"Ripeness" is satisfied when "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an

actual, concrete injury." *Williamson County*, 473 U.S. at 193. The BOF's Final Order certainly did that. Under the BOF's own regulation, it had no discretion but to deny Petitioner the right to harvest 56 acres of merchantable timber, unless Petitioner obtained an ITP for the owls from the USF&WS. Moreover, the BOF did not base its decision on the possibility that it might, in the future, approve Petitioner's logging plan, if Petitioner obtained an ITP. In fact, the BOF's Final Order (App. S) cites a letter from its counsel to the USF&WS, reproduced as Appendix Y, indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an ITP was not required. Likewise, potential future exercise of discretion by the BOF allowing Petitioner to log its timber based upon an ITP from the USF&WS would not bar a temporary takings claim based on the BOF's Final Order. Until that Final Order was reversed, a taking was occurring. *Lucas*, 505 U.S. at 1012-13; *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987). The granting of an ITP, and a waiver based upon it, would have merely turned a permanent taking into a temporary one.

Under *Williamson County*, a landowner is not required to seek review from another agency that does not have the authority to participate in the decision-making process. 473 U.S. at 193. The USF&WS had no authority to authorize logging; its concern under the ESA is to prevent the owls from being harmed in a manner that actually kills or injures them. *Sweet Home*, 515 U.S. at 700 n.13. By requiring Petitioner to apply for an ITP under the ESA, the State was imposing a requirement as a condition for its approval that does not exist under federal law. *Defenders of Wildlife*, 204 F.3d at 927.

Nor, as this Court subsequently stated in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986), can government require "unfair procedures in order to" satisfy ripeness. Trying to obtain an ITP from the

USF&WS under the exception provision in Oregon Administrative Rule 629-665-0210(5) would have been an unfair, repetitive exercise in futility. *City of Monterey*, 526 U.S. at 698-99.

It would have been unfair because the ITP process would likely have added years to the administrative process, when the State knew that the USF&WS would not issue an ITP based upon its own spotted owl Procedures. (Apps. P, R.) required conservation measures far broader than those needed for the owls nesting in Petitioner's timber. *See also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 326, 335 (1997) ("Property owners repeatedly voice dismay over their almost Kafkaesque inability to reach closure under the ESA."); Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems and Promising Precedents*, 27 Envtl. L. 803, 805 (1997) (USF&WS requires, as part of a Habitat Conservation Plan that is part of ITP process, that landowners protect habitat not only for subject species of ITP, but also for "all species which might ever reside on the property"). Likewise, even if an ITP were issued, the BOF was not required to approve Petitioner's logging plan. Or. Admin. R. 629-665-0210(5); (App. J).

It would have been repetitive, because if the USF&WS had issued an ITP for the owls nesting in the Unit, the new plan would have been to harvest the same 56 acres of timber that the BOF had disapproved in its Final Order. Since the BOF created the subject regulation, it could have exercised its discretion and approved harvesting the timber when the plan was initially before it, by simply waiving or rescinding the rule. The State did not need the USF&WS' approval of an ITP to grant that permission.

It would have been an exercise in futility, because the record on appeal clearly indicates that if Petitioner had sought an ITP from the USF&WS in 1993, before the BOF's Final

Order, the USF&WS would not have issued an ITP. (Apps. P, R.)

The record shows that shortly before the State deemed the Boise Cascade nest site to have been abandoned, the USF&WS obtained an injunction against another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site (a mile's distance is well beyond the 70-acre core area protected under Oregon law). *United States v. W. Coast Forest Res. Ltd. P'ship*, No. CIV. 96-1575-HO, 2000 WL 298707, at *1 (D. Or. Mar. 13, 2000). A copy of that order is reproduced as Appendix Z ("App. Z"). That injunction was not lifted until almost three years later when, after monitoring the owls' movements by radiotelemetry, the USF&WS failed to prove that logging the subject timber would have any significant impact upon them. (App. Z, 2000 WL 298707, at *5.) Also while this action was pending before the Oregon courts, the State brought a legal action against the USF&WS, alleging that it had threatened to take legal action against the State and its employees, pursuant to the ESA, if they failed to enforce the Procedures that the USF&WS had been forced to rescind. *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO (complaint dated July 1993 at 4). A copy of that complaint is reproduced as Appendix AA.

Shortly after the State, in October 1997, declared the nest site on Petitioner's land to have been abandoned, Boise Cascade submitted, and the State Forester approved, a new logging plan to harvest the 56 acres that had previously been protected. Petitioner, through its counsel, inquired of the USF&WS whether it still considered the site to be protected under the ESA due to the death of the female owl and the abandonment of the nesting site by the male owl. Counsel for the federal government responded by indicating that the USF&WS did still consider the nesting site to be occupied and suggested Boise Cascade apply for an ITP if it desired to harvest its timber. A copy of the federal government's

December 10, 1997 letter is reproduced as Appendix BB. Petitioner then commenced an action in the United States District Court for the District of Oregon against the USF&WS, seeking a declaratory judgment that the site was no longer occupied and was, therefore, no longer protected under the ESA. *Sweet Home*, 515 U.S. 687. The federal government filed a counterclaim seeking an injunction barring Petitioner from logging its timber because the USF&WS did not consider the nest site to have been abandoned. The district court granted the government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP for the owls. A copy of the district court's decree and judgment is reproduced as Appendix CC.

As a result of the injunction, Petitioner submitted an application for an ITP to the USF&WS, along with a Habitat Conservation Plan for the Unit. In August 1999 the USF&WS also came to the conclusion that the site had been abandoned and notified Petitioner that it would not oppose dissolving the injunction. A copy of that letter is reproduced as Appendix DD. This was two years after the State had declared the site to have been abandoned. Over nine years elapsed between the time the State adopted its regulations that prevented Petitioner from logging its timber and the date the federal injunction was lifted. The law does not require the doing of a useless act in order to satisfy ripeness.

The BOF's Final Order clearly defined the impact of the regulation on Petitioner's property: Petitioner was prevented from making any economic use of 56 acres of merchantable timber. Once the BOF issued its Final Order, there was no question about how the subject regulations applied to the particular land in question. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997). At that point there was no permissible economic use of the timber subject to the restriction. The BOF had no discretion under its own rule but to deny Petitioner's logging plan, unless Petitioner was

successful in the future in obtaining an ITP for the owls from the USF&WS. Moreover, as this Court stated in *Suitum*, Petitioner's "takings claim [cannot] be kept at bay from year to year" on the remote possibility that the USF&WS would grant an ITP, which in turn would allow the BOF to exercise its discretion and approve Petitioner's logging plan. *Id.* at 741. Such a rule, as adopted by the subject regulation and approved by the courts below, would allow the State "to stultify the Fifth Amendment's guarantee." *Id.*

This Court's prudential ripeness doctrine is based on the fact that land use boards usually have a "high degree of discretion" in applying a law to a parcel of property. *Id.* at 738. However, the BOF was not applying a land use regulation, and it had no discretion under Oregon Administrative Rule 629-665-0210 but to deny Petitioner the right to log the area surrounding the spotted owl nest site. Only it could waive or modify that rule; the USF&WS could not.

Even if Petitioner had applied for an ITP after the BOF had issued its Final Order in 1992, that would not have barred Petitioner's claim for compensation for a temporary takings claim for the period it was prevented from logging its property. *First English*, 482 U.S. 304; *Lucas*, 505 U.S. 1003. If the USF&WS had denied an ITP, the BOF had no authority to reverse its Final Order and allow Petitioner to log its property, unless it waived or modified its rule, which it always had the discretion to do and could have done before it issued its Final Order. Or. Admin. R. 629-665-0210(5). And if the ITP was granted, the BOF was also under no obligation to reverse its Final Order and allow Petitioner to log its property. *Id.*

B. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

The Oregon Court of Appeals' reversal of the "takings" judgment entered here after trial is contrary to the basic

physical taking jurisprudence of this Court as stated in *Tahoe*, *Brown*, *Loretto*, *Yee* and *Kaiser Aetna*. There is, however, a split among the lower courts in cases involving wildlife over whether a property owner can sustain a claim based on a physical takings theory. The earlier and better reasoned cases focus on whether the property owner has the right under the subject law to exclude the animals from its land. If not, the forced occupation imposes a wildlife servitude. *Bailey*, 126 F.2d 317; *Herwig*, 117 N.W.2d 335; *Shellnut*, 258 S.W.2d 570. In conflict with this line of cases are those such as the decision below that avoid the public use and exclusion analysis, and hold that there was no forced occupation that constituted a taking, because the State has no control over wildlife. *Boise Cascade*, 296 F.3d 1339; *see also Christy*, 857 F.2d 1324; *Fla. Game & Fresh Water Fish Comm'n*, 636 So. 2d 761; *Sierra Club*, 26 Cal. Rptr. 2d 338.

As pointed out above, the Oregon appellate courts have raised hurdles to satisfying prudential ripeness requirements that go far beyond this Court's takings jurisprudence. They also have a long history of misreading or ignoring this Court's takings jurisprudence. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994); *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (Scalia and O'Connor, JJ., dissenting); *Dodd v. Hood River County*, 836 P.2d 1373 (Or. Ct. App. 1992), *aff'd*, 855 P.2d 608 (Or. 1993) (dismissing much of what this Court stated in *Lucas* as dicta); *GTE Northwest v. Pub. Util. Comm'n of Or.*, 883 P.2d 255 (Or. Ct. App. 1994), *rev'd*, 900 P.2d 495 (Or. 1995).

CONCLUSION

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Oregon Court of Appeals.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS OF OREGON

93-2018; A115966

BOISE CASCADE CORPORATION,
a Delaware Corporation,
Appellant,

v.

BOARD OF FORESTRY,
Respondent.

Argued and Submitted Nov. 14, 2002.
Decided Feb. 12, 2003.

Before HASELTON, *Presiding Judge*, and DEITS, *Chief Judge*,* and WOLLHEIM, *Judge*.

This appeal concerns the latest installment in an ongoing dispute between plaintiff Boise Cascade Corporation (Boise), and defendant Board of Forestry (board), that has been taking place for a decade. After our last remand of the case to the trial court, it denied Boise's motion for summary judgment and granted the board's motion for summary judgment. Boise appeals. As explained below, we conclude that the trial court properly denied Boise's motion for summary judgment, but that the board was not entitled to summary judgment either. We thus reverse and remand.

In May 1992, the board denied Boise's plan to harvest timber from a 56-acre portion of the "Walker Creek Unit" in

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* Deits, C.J., vice Armstrong, J.

Clatsop County in which a pair of northern spotted owls were nesting. Boise initiated this action for inverse condemnation in early 1993, alleging that, by failing to approve that plan, the board had "taken" certain timber in violation of Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. The trial court dismissed Boise's claims on the ground that it lacked subject matter jurisdiction and that Boise's complaint failed to state a claim. At virtually the same time, Boise petitioned for judicial review of the order disapproving the timber harvest and appealed the trial court's dismissal of its inverse condemnation claim. In the administrative review case, we rejected Boise's arguments concerning the validity of the administrative rule upon which the board based its decision and affirmed the order. *Boise Cascade Corp. v. Board of Forestry (A78968)*, 131 Or.App. 552, 886 P.2d 1041 (1994), *aff'd*, 325 Or. 203, 935 P.2d 422 (1997) (*Boise I*). In the inverse condemnation case, we held that the trial court had erred in concluding that it lacked jurisdiction, and further held that Boise's complaint did state a claim. *Boise Cascade Corp. v. Board of Forestry (A79626)*, 131 Or.App. 538, 886 P.2d 1033 (1994) (*Boise II*). On review of that case, the Oregon Supreme Court agreed with us in pertinent part that the court had jurisdiction and that Boise had stated a claim for a regulatory taking. *Boise Cascade Corp. v. Board of Forestry (542159)*, 325 Or. 185, 935 P.2d 411 (1997) (*Boise III*).

On remand, Boise dropped its claim under Article I, section 18, of the Oregon Constitution. The trial court granted Boise partial summary judgment, ruling as a matter of law that a regulatory taking had occurred. Around that time, one of the nesting owls died, the other left the Walker Creek Unit, and the board lifted its temporary restriction on Boise's logging of the site. Boise's claim thus was transformed to a

claim for a "temporary" taking.[1] Damages were tried to a jury, as was the question of whether a taking by "physical occupation" had occurred. After a jury verdict in Boise's favor, the board appealed.

In that appeal, the board argued that the trial court erred in failing to dismiss Boise's claim, in granting partial summary judgment, in striking its ripeness defense, and in numerous other respects. *Boise Cascade Corp. v. Board of Forestry*, 164 Or.App. 114, 116-18, 991 P.2d 563 (1999), *rev. den.*, 331 Or. 244, 18 P.3d 1099 (2000), *cert. den.*, 532 U.S. 923, 121 S.Ct. 1363, 149 L.Ed.2d 291 (2001) (*Boise IV*). In *Boise IV*, we agreed with the board on two of its arguments. First, we agreed that the trial court erred in submitting Boise's taking by "physical occupation" theory to the jury. 164 Or.App. at 126, 991 P.2d 563. Second, we agreed that the trial court erred in striking the board's defense that Boise's claim was not ripe because it had neither attempted to obtain an "incidental take permit" (ITP)[2] nor shown that attempting to obtain such a permit would have been futile. *Id.* at 128-32, 991 P.2d .563. We also rejected Boise's argument that its trial exhibits demonstrated that it would have been futile to try to obtain an ITP. First, we noted that trial exhibits were not relevant to whether the trial court erred in striking a de-

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[1] We note that the legal landscape for "temporary" takings has changed significantly since this issue was initially presented to the trial court. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (a temporary restriction that merely causes a diminution in value of property is not a taking of the parcel as a whole; property is not rendered valueless by a temporary prohibition on economic use because the property will recover value as soon as the prohibition is lifted).

[2] The administrative rule under which the board had denied Boise's harvesting plan allowed an exception to the requirement for protecting northern spotted owl nesting sites if the operator had obtained an incidental take permit pursuant to the federal Endangered Species Act. *Id.* at 128, 991 P.2d 563.

fense from the pleadings. *Id.* at 133, 991 P.2d 563. Alternatively, we concluded that the exhibits on which Boise relied did not, in fact, demonstrate futility. *Id.* We thus reversed the verdict in favor of Boise and remanded the case. *Id.*

On remand, both parties sought summary judgment on the question of ripeness and futility. Most of Boise's arguments in support of summary judgment were to the effect that this court's decision concerning ripeness and futility in *Boise IV* was wrong. The trial court rejected those arguments and, to the extent that Boise repeats them at great length on this appeal, we reject them without further discussion. *See generally State v. Pratt*, 316 Or. 561, 569, 853 P.2d 827 (1993) (under the law of the case doctrine, "when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal").

Boise also argued in its motion for summary judgment, however, that it was entitled to judgment as a matter of law on the question of futility. Boise suggested that the board, in asserting a ripeness defense, was required to demonstrate that, had Boise sought an ITP, the federal United States Fish and Wildlife Service (USFWS) would have granted it and, further, that the board then would have authorized the logging on the Walker Creek Unit. In support of its arguments, Boise relied on certain federal "guidelines for consideration of incidental take permits" that it asserted "call[ed] for the elimination of, and not the granting of permits for, timber sales that embrace active nesting sites." (Emphasis in original.) It also submitted materials from which it drew the conclusion that, even after the female owl died and the male owl moved away in 1997, "the USFWS *still* took the position that the Walker Creek site had not been abandoned under federal law." (Emphasis in original.) *But see* 186 Or.App. at 303 n. 5,

63 P.3d 605). Boise asserted that the USFWS's position in the late 1990s demonstrated that it would not have granted an ITP when Boise first sought to log the site many years earlier.

The board, in its motion for summary judgment, asserted that it was too late, as a matter of law, for Boise to be able to demonstrate futility. The gist of the board's argument on this point was that Boise was required to have made its "futility" showing concerning an ITP in the course of *Boise I*, the administrative case described above. The board argued that "estoppel" and "issue preclusion" prevented Boise from arguing in the present case that it would have been futile to attempt to obtain an ITP, because it maintained a position in *Boise I* that ITPs were not required for private lands. While the board maintained that Boise's showing on summary judgment was insufficient to demonstrate futility as a matter of law, the board did not make any arguments other than those described above, or submit any exhibits, to show that it was entitled to summary judgment on the question of ripeness and futility as a matter of law.

The trial court granted the board's motion and denied Boise's motion. Its letter opinion indicated that it was denying Boise's motion on the ground that Boise had demonstrated nothing more than "predictions" about the likely success of an application for an ITP, and that it was granting the board's motion on the ground of "issue preclusion."

Boise appeals, arguing that the trial court erred in granting the board's motion for summary judgment and in denying its own motion. As noted above, we summarily reject Boise's attempts to relitigate the issue decided in the previous appeal concerning the availability of the ripeness defense, thus disposing of the majority of the arguments Boise asserts in this appeal. That leaves, as viable issues before us, Boise's argument that it was entitled to summary judgment as a matter of law on the board's ripeness defense and its

argument that the board was not entitled to summary judgment as a matter of law on that defense.

In response, the board concedes that Boise's failure to litigate futility in *Boise I* does not preclude Boise from attempting to demonstrate fertility in this proceeding. The board acknowledges that that was the basis for the trial court's grant of its motion for summary judgment. The board argues, however, that "the trial court also dismissed because Boise failed to show that its claim was ripe * * * and failed to present sufficient evidence; of futility to raise a factual issue and avoid summary judgment." The board also asserts as an alternative basis for affirmance that the trial court's grant of the board's motion for summary judgment was correct because Boise, having dropped it3 claim under Article I, section 18, of the Oregon Constitution, cannot, as a matter of law, establish a violation of the Fifth Amendment to the United States Constitution. *See generally Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982) (a federal takings claim does not ripen until the claim under Article I, section 18 has been decided).[3] Finally, the board asserts that, regardless of whether it was entitled to summary judgment, Boise nonetheless was not entitled to summary judgment on the futility issue based on the exhibits that it submitted.

We turn first to the board's asserted alternative basis for affirmance based on *Suess Builders Co.*, because it potentially would dispose of all issues in this case. As noted, this asserted basis for affirmance concerns a different theory of "unripeness" from the theory that the board pleaded as a defense and that served as the basis for our previous remand in *Boise IV*. In *Boise II*, 131 Or.App. at 540 n. 2, 886 P.2d

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[3] *Accord Bailey v. U.S. Army Corps of Engineers*,___F.Supp.___, 2002 WL 31728947 (D.Minn.2002) (federal takings claim was not ripe because plaintiff failed to pursue an inverse condemnation action based on state constitution).

1033, we noted that ripeness issues are not jurisdictional, and that they generally must be presented as matters of defense. Here, while the board did assert a ripeness defense below, it was not the same ripeness defense it now sets forth. We conclude that an entirely new ripeness defense that was not raised in the lower court cannot serve as an alternative basis for affirmance on appeal. In *Rogers v. Valley Bronze of Oregon, Inc.*, 178 Or.App. 64, 68-69, 35 P.3d 1102 (2001), we concluded that a new theory of defense of failure to state a claim under ORCP 21 A(8) could not be advanced in the first instance on appeal, given the rationale of *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 381, 8 P.3d 200 (2000), *adhered to on recons*, 331 Or. 595, 18 P.3d 1096 (2001), that ORCP 21 G(3) requires such a defense to be made "in any pleading permitted or ordered under Rule 13 B or by motion for judgment on the pleadings or at trial on the merits." That holding is controlling here. The board's ripeness defense based on *Suess Builders Co.* is, in essence, a defense of failure to state ultimate facts sufficient to constitute a claim, ORCP 21 A(8). As such, it must be raised under the circumstances specified in ORCP 21 G(3). In *Rogers*, we noted that an "appeal from an order granting a motion to dismiss is not one of the limited circumstances in which a defendant may assert a new defense of failure to state ultimate facts constituting a claim." 178 Or.App. at 69, 35 P.3d 1102. Neither is an appeal from a summary judgment.

We thus turn to the first issue raised in Boise's appeal—whether the board was entitled to summary judgment. As noted, the trial court granted the board's motion based on its argument that Boise was estopped or precluded from demonstrating futility now, because it should have done so when it was litigating the administrative case, *Boise I*. For the following reason, we accept the board's concession that the trial court erred in granting its motion for summary judgment based on "issue preclusion." Issue preclusion applies when:

"1. The issue in the two proceedings is identical.

"2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.

"3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.

"4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.

"5. The prior proceeding was the type of proceeding to which this court will give preclusive effect."

Nelson v. Emerald People's Utility Dist., 318 Or. 99, 104, 862 P.2d 1293 (1993) (citations omitted).

The problem here is with the first criterion. *Boise I* concerned the validity of a state administrative rule that, in turn, referenced the need for an ITP from the federal government. 131 Or.App. at 554-55, 886 P.2d 1041. While Boise certainly attempted to litigate aspects of "takings" in *Boise I*, it was seeking to have the portion of the administrative order that discussed regulatory takings declared invalid. *Id.* It was not, in the administrative proceeding, seeking just compensation for a taking by inverse condemnation. Thus, it did not, and was not required to, litigate whether such an inverse condemnation was "ripe" or whether an application for an IT? would have been "futile."[4]

Finally, we address the board's argument that the trial court, although stating that it was granting summary judgment on the basis of "issue preclusion," also granted the board's motion for summary judgment because Boise "failed to present sufficient evidence of futility to raise; a factual

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[4] We note, moreover, that "futility" is a response to a "ripeness" defense. The board has not asserted here that it raised any sort of ripeness defense in *Boise I*. Thus, the board also has not demonstrated that "futility" was an issue that was "essential to a final decision on the merits in the prior proceeding." *Nelson*, 318 Or. at 104, 862 P.2d 1293.

issue and avoid summary judgment." We disagree with the board's characterization of the trial court's ruling. The board's motion for summary judgment simply did not attempt to put Boise's evidence to the test on that point. As noted above, the board's summary judgment argument was that Boise, as a matter of law, was precluded from *making* a futility showing—it did not argue that Boise could not, as a matter of fact, actually show futility. Thus, we reject the board's argument that it was entitled to summary judgment based on the sufficiency—or lack thereof—of Boise's evidence of futility.

The only remaining question, then, is whether the trial court erred in denying Boise's motion for summary judgment. That motion—in contrast to the board's motion—did raise the issue of whether Boise's evidence demonstrated that it was entitled to judgment as a matter of law on the board's ripeness defense because applying for an ITP would have been futile. We conclude that Boise's evidence was not sufficient to entitle it to summary judgment on that point.

As an initial matter, we point out that, in evaluating Boise's motion for summary judgment, we view the evidence in the light most favorable to the opposing party, the board. ORCP 47 C; *see Jones v. General Motors Corp.*, 325 Or. 404, 939 P.2d 608 (1997). In light of that standard of review, many of Boise's arguments make little sense. Boise seems to be asserting that, in order to avoid summary judgment in Boise's favor, the board was required to show that "in 1993, the USFWS would have granted Boise an ITP" and that, "if an ITP had been issued, the board would have exercised its discretion and authorized the logging." Boise also suggests that "futility" is evaluated based on a "more likely than not" or "preponderance of the evidence" standard. Thus, Boise suggests, if the evidence demonstrates that it is more likely than not that the USFWS would have denied its application for an ITP in 1992 or 1993, then Boise was entitled to

summary judgment as a matter of law. Boise's assertions demonstrate a fundamental misunderstanding not only of the "futility" doctrine, but of burdens of proof and the summary judgment process.

It is the plaintiff, not the defendant, who bears the burden of demonstrating futility. *See, e.g., Curran v. ODOT*, 151 Or.App. 781, 788, 951 P.2d 183 (1997) ("To prevail on a futility argument, plaintiffs had to submit evidence that would support a finding that there were no other reasonable locations for an access road."). Moreover, a plaintiff seeking summary judgment on a ripeness defense based on its evidence of futility must demonstrate that there is no genuine issue of material fact that the further actions that the defendants are contending are necessary for ripening of a claim would have been futile. It is at least possible that Boise could be said to have met such a standard if it were correct that futility can be established with evidence that it is "more likely than not" that USFWS would have denied an application for an ITP in 1992 or 1993. However, Boise cites no authority, and we are aware of none, that stands for the proposition that the test for futility is indeed that it is "more likely than not" that an application would have been denied.

Case law from the United States Supreme Court concerning the futility exception to the ripeness doctrine has not specified in great detail the quantum of evidence required to establish futility. However, that case law, as well as the plain meaning of the word "futile," lead to a conclusion that futile does not equate to "more likely than not." The common meaning of the word "futile" is "serving no useful purpose: INEFFECTIVE, FRUITLESS." *Webster's Third New Int'l Dictionary* 925 (unabridged ed. 1993). "Futility" is defined as "an abortive attempt or useless gesture." *Id.* The Court's most recent pronouncement on the subject, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), was that "federal ripeness rules do not

require the submission of further and futile applications with other agencies." An examination of the facts of that case sheds light on what the Court meant by the word "futile." In *Palazzolo*, a landowner owned property that, under state law, was considered protected wetland on which filling was prohibited. 533 U.S. at 614, 121 S.Ct. 2448. There existed an exception only if a "compelling public purpose" would be served by the filling. *Id.* A state agency denied the landowner's proposed use, finding that it did not satisfy the "compelling public purpose" standard. In rejecting the board's argument that the landowner's claim was not ripe because he had not submitted applications for other types of development on the land, the Court stated:

> "On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point."

Id. at 621, 121 S.Ct. 2448. In sum, further applications under those circumstances would have been futile because the state law in question allowed for only one exception, for a "compelling public purpose," and the board already had determined that that exception did not apply. Thus, "futile," as used by the Court in *Palazzolo*, meant "serving no useful purpose." *Webster's* at 925.

A comparison of *Palazzolo* to *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), is instructive. That case also concerned ripeness. There, a developer was attempting to develop a residential subdivision for which its predecessor had received a preliminary approval from local government. *Williamson Planning Commission*, 473 U.S. at 177, 105 S.Ct. 3108. Over the next few years, parts of the proposed development were

given final approval and built. *Id.* at 178, 105 S.Ct. 3108. In light of mistakes discovered in the original preliminary approval, the local government asked the developer to submit a revised preliminary plat. The local government rejected the revised plat on the ground that it did not comply with various ordinances and regulations. *Id.* at 180-81, 105 S.Ct. 3108. The developer then brought an action pursuant to 42 U.S.C. section 1983, alleging a taking without just compensation. The Court held that the developer's claim was not ripe:

> "[R]espondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that *variances could have been granted* to resolve at least five of the Commission's eight objections to the plat."

Williamson Planning Commission, 473 U.S. at 188, 105 S.Ct. 3108 (emphasis added). The Court rejected the developer's argument that denial of approval of the plat "was equivalent to a denial of variances." *Id.* It noted that the regulations in question clearly stated that "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." *Id.* at 189, 105 S.Ct. 3108. The Court concluded:

> "Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted."

Id. at 190, 105 S.Ct. 3108. Thus, in *Williamson Planning Commission*, there was no "futility" exception to the ripeness requirement because it appeared to the Court that "variances *could* have been granted" that would have allowed the

development to occur. 473 U.S. at 188, 105 S.Ct. 3108. The Court did not speculate on whether it was "more likely than not" that such variances would be granted. *See also Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 740, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) (regulatory taking claim was ripe where "little or no uncertainty" remained as to the value of the petitioner's "transferable development rights"); *MacDonald, Somers Frates v. County of Yolo*, 477 U.S. 340, 352, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) (taking claim was not ripe where there was "le[ft] open the possibility that some development will be permitted").

In sum, while the Court's cases do not precisely quantify futility, the Court has found futility where development required filling but, under the laws, there could be "no fill for any likely or foreseeable use," *Palazzolo*, 473 U.S. at ___, 121 S.Ct. 2448, and where there was "little or no uncertainty" as to the value of certain development rights, *Suitum*, 520 U.S. at 740, 117 S.Ct. 1659; but *not* where there was left open "the possibility of some development," *MacDonald*, 477 U.S. at 352, 106 S.Ct. 2561; or where "variances could have been granted" that might have permitted development, *Williamson Planning Commission*, 473 U.S. at 188, 105 S.Ct. 3108. Synthesizing the holdings in those cases, we conclude that, where there remains an unexplored possibility under the regulations in question that development can occur, a claim is not ripe and the "futility" exception will not apply unless the party claiming futility can show that there was very little likelihood—or no likelihood—that the development would have been approved had that party taken further steps to obtain approval.

With that standard in mind, we examine the exhibits that Boise submitted in support of its claim for summary judgment on the state's ripeness defense. Most of the exhibits simply are not relevant in any significant way to the question before us. Many contain bits and pieces of pleadings and

arguments made in several other cases concerning timber harvesting. Those isolated excerpts do not in any way shed light on whether Boise could have obtained an incidental take permit from USFWS in 1992 or 1993 for harvesting timber in the Walker Creek Unit. Boise also submitted excerpts from an action it brought in federal court, apparently in 1998, in an effort to obtain an advisory opinion from USFWS as to whether it would be in violation of the Endangered Species Act were it to log the Walker Creek Unit.[5] The material submitted demonstrates nothing except that, as early as 1998, the USFWS had not taken a position on whether such a project would violate the act. Particularly in light of the fact that Boise did not actually apply for an ITP until November 1998,[6] we conclude that that material simply is not relevant to determining the likelihood of Boise receiving an ITP in 1992 or 1993.

Two remaining exhibits submitted by Boise in support of its motion for summary judgment merit discussion. The first is a document labeled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl, U.S. Fish and Wildlife Service, Region 1, July 1990." Boise does not dispute that those guidelines were rescinded in 1992, before the controversy at issue here arose, but appears to maintain that the USFWS might have continued to rely on them. These guidelines appear to relate primarily to planned and proposed sales of timber on federal lands. They contain

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[5] As noted above, by that point in time, the board was no longer taking the position that the unit should not be logged. By 1998, the owls that were present in 1992 and 1993 were no longer on the site. It appears, however, that later litigation between Boise and USFWS about the Walker Creek Unit may have concerned the presence of another owl found dead on the site long after the events at issue in this case. *See generally Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed.Cir.2002).

[6] USFWS indicated that Boise could proceed with the logging in July 1999.

numerous recommendations, only one of which is relevant here: "[I]f incidental take is identified as a concern on state or private lands, individual landowners should consider development of a habitat conservation plan." The document says nothing about the likelihood of the issuance of ITPs in any particular circumstances. While the recommendations do reflect a general concern for preservation of spotted owl habitat, even assuming that USFWS continued to consult those guidelines after they were rescinded, they do not provide any basis for speculating on whether a private landowner's application for an ITP would have been successful in 1992 or 1993. The other exhibit is part of a document entitled "Recovery Plan for the Northern Spotted Owl—Draft," dated April 1992. The pages of the draft submitted by Boise detail a decline in northern spotted owl habitat in western Oregon. Again, while the draft expresses USFWS's concern for preserving owl habitat, it does not provide information pertaining to the likelihood of Boise obtaining an ITP.

We thus conclude that Boise was not entitled to summary judgment as a matter of law on the board's ripeness defense. In sum, neither party was entitled to summary judgment based on the theories that each advanced and on the exhibits submitted to the trial court.

Summary judgment in favor of defendant reversed and remanded.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OREGON

Clatsop County Circuit Court
Case No. 93-2018

BOISE CASCADE CORPORATION, a Delaware Corporation,
Plaintiff-Appellant, Petitioner for Review

v.

BOARD OF FORESTRY,
Defendant-Respondent, Respondent on Review.

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

Dated this 29th day of July 2003.

/s/ WALLACE P. CARSON, JR.
Wallace P. Carson, Jr.
Chief Justice

De Muniz and Balmer, JJ., Not Participating

APPENDIX C

CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP
Clatsop County Courthouse
749 Commercial
PO Box 659
Astoria, OR 97103

Case No. 93-2018

BOISE CASCADE

v.

DEPARTMENT OF FORESTRY

Paula J. Brownhill, Circuit Judge
(503) 325-8555
Philip L. Nelson, Circuit Judge
(503) 325-8536

September 3, 2001

William F. Cloran
Assistant Attorney General
Trial Division
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Phillip D. Chadsey
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Dear Mr. Cloran and Mr. Chadsey:

I heard arguments on the motions for summary judgment on July 23, 2001. I have reviewed plaintiff's reply memorandum in support of its motion for summary judgment and Mr. Chadsey's supplemental affidavit, and I read *Palazzo* and several other cases. I will grant the state's motion for summary judgment on both the Loretto and Lucas claims. Mr. Cloran should prepare the judgment.

SUMMARY OF THE CASE

After the jury returned a verdict for plaintiff on its inverse condemnation claim, the state appealed. The court of appeals found that I erred in striking the state's ripeness defense (the defense was that plaintiff's claim was not ripe because plaintiff failed to obtain an incidental take permit from federal authorities under the Endangered Species Act in 1992). Plaintiff responded with several arguments, including futility, all of which the court of appeals rejected.

The case was remanded, and plaintiff and defendant filed motions for summary judgment. Plaintiff agreed the state's motion for summary judgment should be granted on the Loretto claim. The state argued the Lucas claim is not ripe and never can be and Boise Cascade is precluded by the doctrine of equitable estoppel from claiming futility. Plaintiff argued it was not required to seek an incidental take permit under *Palazzo* and it would have been futile to seek an incidental take permit in any case.

CONCLUSIONS

In *Palazzo v. Rhode Island*, 121 SCt2448 (2001), the U.S. Supreme Court held that the Rhode Island Supreme Court erred in ruling that plaintiff's claim was not ripe because it failed to explore other uses for the property when its application to fill wetlands was denied. It repeated the holding in *Williamson Planning Commission v. Hamilton Bank*, 473 US 172 (1985), that federal ripeness rules do not

require the submission of further and futile applications with other agencies.

The Oregon Court of Appeals' 1999 opinion cited *Williamson* and other cases discussed in *Palazzo*. Given the court of appeals' interpretation of *Williamson*, it is unlikely it would decide this case differently after *Palazzo*.

I agree with the state's arguments regarding issue preclusion. Issue preclusion typically applies when: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; and (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding. *Nelson v. Emerald People's Utility District*, 318 Or. 99, 104 (1993); *State Farm Fire and Casualty v. Reuter*, 299 Or. 155, 158-59 (1985). All of those criteria are satisfied in this case.

Although the court of appeals was discussing a motion to strike the defense of ripeness when it rejected plaintiff s futility argument, its comments about futility in *Larson v. Multnomah County*, 121 Or App 119, 122 (1993) indicate its approach to the subject:

> "We further concluded, in *Joyce* and *Dority*, that arguments based on the futility exception to the ripeness rule should seldom be entertained and should not ever be considered if they amount to nothing more than predictions about the success of applications to the local governments."

For these reasons, the plaintiffs motion for summary judgment is denied; defendant's motion for summary judgment is allowed. The court will cancel the September 11, 2001 trial.

Yours truly,

/s/ Paula Brownhill
Paula Brownhill

APPENDIX D

COURT OF APPEALS OF OREGON

(93-2018; CA A100855)

BOISE CASCADE CORPORATION,
a Delaware Corporation,
Respondent,

v.

STATE OF OREGON, BY AND THROUGH THE
OREGON STATE BOARD OF FORESTRY,
Appellant.

Appeal After Remand from Circuit Court,
Clatsop County
Paula J. Brownhill, Judge

Argued and Submitted Feb. 22, 1999.
Decided Nov. 10, 1999.

Before De MUNIZ, *Presiding Judge*, and DEITS, *Chief Judge*, and ARMSTRONG, *Judge*.

The state appeals from a jury verdict in favor of plaintiff Boise Cascade (Boise) on its claim for a temporary taking of a stand of timber in which a pair of northern spotted owls were nesting. For the following reasons, we reverse and remand.

In 1988, Boise acquired 1,770 acres of commercial timberlands in Clatsop County and conducted some logging activities on its property. Also in 1988, the Oregon Department of Fish and Wildlife designated the northern

spotted owl as a threatened species. In 1990, the State Forester adopted an administrative policy precluding timber harvesting within a 70-acre area around known spotted owl nesting sites, ultimately codified as *former* OAR 629-24-809.[1] In 1991, Boise sold all of those commercial timberlands except for a 64-acre parcel (the Walker Creek site), which the buyer refused to accept due to the presence of a northern spotted owls' nest on the site. The present dispute centers around the state's refusal to permit logging on the Walker Creek site during the period that the spotted owls were nesting there.

A spotted owl had been seen on the Walker Creek site in 1986, and a pair of spotted owls nested on the site in 1990, hatching two offspring. Another spotted owl was seen on the site in 1991. A breeding pair was present on the site in 1992. In early 1992, Boise sought approval from the State Forester of its plan to harvest the timber on the site. The State Forester did not approve Boise's harvesting plan because the plan did not identify for protection 70 acres of suitable spotted owl habitat encompassing the nesting site at Walker Creek. The Board of Forestry upheld the denial of Boise's plan on the ground that the proposed plan failed to comply with *former* OAR 629-24-809. A subsequent plan permitted

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[1] *Former* OAR 629-24-809 provided, in part:

> "(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> > "(a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat[.]"

A substantially similar rule is currently found at OAR 629-665-0210.

Boise to log several acres of the Walker Creek site but only during time frames when no owls were nesting on the site.

Boise initiated this action for inverse condemnation, arguing that the refusal to permit it to log the Walker Creek site constituted a taking under Article I, section 18, of the Oregon Constitution, as well as under the Fifth Amendment, as applied to the states through the Fourteenth Amendment, of the United States Constitution. Boise further alleged that the restriction on logging the other acres during the owl nesting season was a temporary taking under both constitutions. The trial court dismissed the complaint. On appeal, we reversed, *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033 (1994), and the Supreme Court allowed review. On review, the Supreme Court affirmed in part and reversed in part, concluding that, although Boise failed to state a claim for a temporary taking of the small amount of timber that the Board of Forestry permitted to be logged, Boise did state a claim for a taking of the remainder of the Walker Creek site. *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 935 P.2d 411 (1997).[2]

On remand, Boise dropped its claim under the Oregon Constitution and proceeded only on its federal constitutional claim. Boise moved for partial summary judgment, and the trial court ruled as a matter of law that a regulatory taking had occurred. The question of damages was tried to a jury, as was a question as to whether a taking by "physical invasion" had occurred. Meanwhile, one of the spotted owls on the Walker Creek site had died and the other had left the site, and all restrictions on logging the site were lifted. The jury returned a verdict for Boise, and the trial court entered judgment for Boise in the amount of $2,279,223 in damages for the

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[2] The court's decision covered other subjects as well, but they are not pertinent to this appeal.

temporary restriction on its logging of the Walker Creek site. This appeal ensued.

On appeal, the state makes numerous arguments that the trial court erred in failing to dismiss the claim, in granting partial summary judgment, in limiting the state's evidence, in instructing the jury, and in various other regards. We turn first to the state's argument that the trial court lacked jurisdiction by reason of the Eleventh Amendment to the United States Constitution.

The state argues that there is no direct right of action under the Fifth and Fourteenth Amendments to the United States Constitution against the state in a state court. The state maintains that, although Congress can, and has, abrogated the states' immunity from suit by way of its power to enforce the Fourteenth Amendment, Boise has not pleaded its case under any statute that abrogates the state's immunity, *e.g.*, 42 USC section 1983. Although the state acknowledges that a number of takings claims under the federal constitution have proceeded in Oregon courts throughout the years, it argues that the sovereign immunity question was not raised and thus was not addressed in those cases.

Boise responds that, although the Eleventh Amendment may bar plaintiffs from pursuing federal constitutional claims against states in federal court, it "has nothing to do with barring a plaintiff from bringing a takings claim against the State, based on the federal constitution, in the Oregon courts[.]" Until quite recently, Boise's position on this question seemed unassailable. *See, e.g., Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 204-05, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) ("But as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'"). However, in a recent series of cases, the United States Supreme Court has significantly altered its position on the question of states' sovereign immunity. Most directly on point is *Alden v. Maine*, 527 U.S. 706, 119 S.Ct.

2240, 144 L.Ed.2d 636 (1999), which concerned an attempt by state employees to enforce the Fair Labor Standards Act (FLSA), 29 USC section 201 et seq., against the state in a state court proceeding. Although the FLSA contains a provision purporting to authorize actions against states in their own courts, the Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 119 S.Ct. at 2246.

The Court first acknowledged that the text of the Eleventh Amendment does not actually address the question of when a state may be sued in its own courts.[3] *Id.* However, after reviewing at length the history of the Tenth and Eleventh Amendments, and its own earlier case law upholding the states' "sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment," *id.* at 2253, the Court concluded that basing decisions concerning states' immunity on the text of the amendment alone would constitute "a historical literalism[.]" *Id.* at 2254. Although acknowledging Congress's power to enact legislation such as the FLSA via the Commerce Clause, the Court concluded that Congress did not have the power to abrogate states' sovereign immunity in doing so. *Id.*

The Court went on to indicate, though, that sovereign immunity would "not bar all judicial review of state compliance with the Constitution[.]" *Id.* at 2266. In particular, the Court pointed out:

> "We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender

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[3] The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

> a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick v. Bitzer*, 427 U.S. 445[, 96 S.Ct. 2666, 49 L.Ed.2d 614] (1976). By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.' *Seminole Tribe [of Fla. v. Florida*, 517 U.S. 44, 59, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)]. When Congress enacts appropriate legislation to enforce this Amendment, *see City of Boerne v. Flores*, 521 U.S. 507[, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. *Fitzpatrick, supra*, at 456 [96 S.Ct. 2666]." *Alden*, 119 S.Ct. at 2267.

In summary, the Court has declared that, even if a state has not waived its sovereign immunity, Congress may, pursuant to the enforcement power granted it by section 5, of the Fourteenth Amendment,[4] enact legislation to enforce constitutional rights that have been made applicable to the states through the Fourteenth Amendment. It is not disputed that the just compensation clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. The

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[4] The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "* * * * *
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

question, then, is whether plaintiff's only remedy for the constitutional violation it alleges is through a positive enactment of Congress, such as 42 USC section 1983, as the state posits.

The parties cite no provision other than 42 USC section 1983 as an affirmative act of Congress that would abrogate the states' sovereign immunity and subject it to takings claims in state courts, and we are aware of none.[5] However, we do not find the state's answer to this issue--that plaintiff failed to state a claim because it did not proceed under 42 USC section 1983--to be satisfactory. Section 1983 actions may be brought against "persons," but a state is not a "person" for purposes of section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). As noted above, though, the Fourteenth Amendment provides that no "*state* [shall] deprive any person of * * * property, without due process of law," and the Fifth Amendment, incorporated as to the states through the Fourteenth Amendment, calls for "just compensation" for a taking of property. (Emphasis added.) In short, section 1983 does not provide for the remedy required by the constitution for a taking of property by the *state*.

Thus, the question comes down to whether Boise can maintain an inverse condemnation action against the state in state court, based on an alleged violation of the Fifth Amendment to United States Constitution, in the absence of congressional action pursuant to section five of the Fourteenth Amendment authorizing such an action. As a general matter, the *Alden* decision discussed above might

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[5] The state concedes that Congress has authority to subject it to suit in state court without its consent. We recognize that *Alden* may well be read to indicate otherwise, but we will treat the state's concession in this case as a partial waiver of any sovereign immunity defense that it is immune from suit in state court even if Congress has the authority to subject it to suit in federal court.

suggest that the answer is "no," because of its emphasis on positive acts of Congress under section five of the Fourteenth Amendment. However, certain language in the *Alden* decision, particularly when read in conjunction with some of the Court's earlier case law describing the Fifth Amendment as "self-executing," casts doubt on such a conclusion. In *Alden*, the Court distinguished the issue before it from the issue presented in *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994):

> "In *Reich v. Collins*, 513 U.S. 106 [115 S.Ct. 547, 130 L.Ed.2d 454] (1994), we held that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be a 'clear and certain' post-deprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. *Id.* at 108 [115 S.Ct. 547]. This case arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a 'clear and certain' postdeprivation remedy. *Ibid.*; *see also Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100[, 102 S.Ct. 177, 70 L.Ed.2d 271] (1981). *In this context, due process requires the State to provide the remedy it has promised. Cf. Hudson v. Palmer*, 468 U.S. 517, 539[, 104 S.Ct. 3194, 82 L.Ed.2d 393] (1984) (O'Connor, J., concurring). *The obligation arises from the Constitution itself*; *Reich* does not speak to the power of Congress to subject States to suits in their own courts." *Alden*, 119 S.Ct. at 2259 (emphasis added).

Although Reich has little direct bearing on the issue before us, as it did not involve any issues of sovereign immunity, the Court's description of *Reich* in *Alden* strongly suggests that states may be required to provide promised remedies in state court proceedings by force of the Due Process Clause alone.

Further support for this idea that the Constitution itself may dictate the availability of remedies in state court under certain circumstances can be found in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Although *First Lutheran* did not squarely present the type of sovereign immunity issue with which we are confronted, it provides significant guidance on the issue. In *First Lutheran*, the plaintiff sued a county after it adopted an interim ordinance that temporarily banned construction within a flood zone. 482 U.S. at 307-08, 107 S.Ct. 2378. The focus of the case was whether a temporary regulatory taking constituted a taking under the Fifth Amendment. It does not appear from the text of the opinion that a sovereign immunity defense was raised. However, the Solicitor General, an *amicus* in the case, did make a sovereign immunity argument that the Court addressed:

> "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation * * *.' *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980), quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev ed 1972). As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. [621], 654-55, 101 S.Ct. 1287, 67 L.Ed.2d 551 [(1981)], it has been established at least since *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933), that claims for just compensation are grounded in the Constitution itself:
>
> > "'The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the

right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*' *Id.* at 16, 54 S.Ct. 26, 78 L.Ed. 142. (Emphasis added [by *First Lutheran* court]).'

"*Jacobs*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306, 43 S.Ct. 354, 67 L.Ed. 664 (1923); *Monongahela Navigation [Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893).[6]

Piecing together the Court's various statements in *First Lutheran* with its description of *Reich* in *Alden*, we conclude that the Court, in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some

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[6] "The Solicitor General urges that the prohibitory nature of the Fifth Amendment * * * combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. *See San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655 n. 21, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting), quoting *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947)." *First Lutheran*, 482 U.S. at 315-16, 316 n. 9, 107 S.Ct. 2378.

constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved. We recognize that our conclusion on this point is not beyond dispute. *See, e.g., Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992), *cert. den.* 506 U.S. 1081, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993) (Takings plaintiff had "no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 USC 1983[.]"). However, particularly in light of the Court's rejection of the *amicus curiae's* sovereign immunity argument in *First Lutheran*, and in light of the fact that the state has explicitly disavowed any reliance on *Alden* in the present case, we conclude that *Alden* should not be read so broadly as to dictate that states may not be sued in state courts on federal takings claims unless they have specifically waived their sovereign immunity. We conclude that, because of the "self-executing" nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state court for takings in violation of the federal constitution.

The state next argues that the trial court erred in denying its motion to dismiss for failure to state a claim under either of two theories: the *Lucas* theory (deprivation of all beneficial use of property) and the *Loretto* theory (physical occupation of property). *See generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). To state a claim under the Fifth Amendment for a taking under a *Lucas* theory, the property owner must allege that a governmental action has deprived the owner of all economically beneficial use of the property. Both this court and the Oregon Supreme Court concluded that plaintiff had stated a claim under this type of theory in the course of the previous appeal. *See Boise*

Cascade, 131 Or.App. at 551, 886 P.2d 1033 ("plaintiff alleges, in essence, that the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under * * * *Lucas*"); *Boise Cascade*, 325 Or. at 198, 935 P.2d 411 (Plaintiff's allegations were "sufficient to meet the 'deprivation of all economically viable use of the property' standard. The Court of Appeals was correct in so holding."). Although plaintiff amended its pleadings after remand, the amended pleadings, insofar as the *Lucas* theory of recovery is concerned, are much the same as its pleadings discussed in the previous appellate decisions in this case. Plaintiff alleged that the state has regulated its property in such a way that all viable economic and beneficial use of the property was eliminated. The trial court properly denied the state's motion to dismiss on the ground that plaintiff failed to state a claim under the *Lucas* theory.

The state also moved to strike plaintiff's allegations that it had suffered a *per se* taking by means of a "permanent physical occupation" in violation of the Fifth Amendment. In its complaint, plaintiff alleged that the administrative rules described above required plaintiffs to maintain spotted owl nests and prevent their abandonment so the nests could be occupied annually by a pair of breeding owls and that the state's denial of plaintiff's plan to harvest the timber constituted a *per se* taking.

The *Loretto* case concerned "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments." 458 U.S. at 421, 102 S.Ct. 3164. The state argues that the court erred in denying its motion to strike this count of plaintiff's claim because plaintiff has not alleged the type of physical occupation at issue in *Loretto*. We agree.

In *Loretto*, the challenged statute required landlords to permit cable television companies to install devices on their property. *Id.* There, the Court recounted at length the historic distinctions between takings involving permanent physical invasion of property and regulations that place restrictions on the use of property. 458 U.S. at 427-35, 102 S.Ct. 3164. One of the early physical invasion cases that the Court discussed in *Loretto* was *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 20 L.Ed. 557 (1871), in which the Court held that "where real estate is actually invaded by *superinduced* additions of water, earth, sand or other material, or by having any *artificial* structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking[.]" (Emphasis added.) *Pumpelly* involved a situation where the government *caused* a party's land to become flooded. However, the Court's "physical occupation" jurisprudence in no way suggests that the same takings analysis would apply where, for example, a natural flood occurred and government regulations pertained to how a landowner was to deal with floodwaters on his or her land. *Compare Pumpelly*, 80 U.S. at 177-78 (where government caused property to flood by constructing a dam, there was a taking by "physical occupation"), *with First Lutheran*, 482 U.S. at 308, 107 S.Ct. 2378 (where flood occurred as a consequence of a forest fire destroying a watershed area, government regulation of construction within flood zone was analyzed under regulatory takings case law).

As the state points out, there are significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest. The natural occurrence of a pair of breeding spotted owls on a piece of property is more akin to the naturally occurring flood in our hypothetical described

above than to a flood caused by the government's construction of a dam, as was the case in *Pumpelly*, or to the installation of an artificial structure such as a cable television box, as was the case in *Loretto*.

The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there. Although plaintiffs have stated a claim for a regulatory taking, they have not stated a claim for a "physical occupation" taking under *Loretto*. The trial court erred in concluding otherwise.

However, that conclusion does not end our inquiry. As noted, plaintiff pleaded two theories in alternative counts as part of its takings claim. Although the court should have stricken the *Loretto* count, it properly denied the state's motion to dismiss the regulatory taking count. As noted above, the trial court granted plaintiff summary judgment on its regulatory taking count and submitted the *Loretto* count to the jury. In response to a separate question, the jury also determined damages, but it is undisputed that the damages under either theory would be the same. Thus, although the submission of plaintiff's *Loretto* theory to the jury was erroneous, the jury's damage award nevertheless was proper if the trial court correctly decided the regulatory taking question. This is not a situation where we cannot tell what theory the jury followed in reaching its conclusion. *Cf. Whinston v. Kaiser Foundation Hosp.*, 309 Or. 350, 357, 788 P.2d 428 (1990) (where more than one theory is submitted to the jury and some are unsupported by the evidence, but it cannot be determined on which allegation the jury based its verdict, a new trial must be granted). Only one theory of liability was before the jury here, and even though it was not properly before the jury, the damages question, which applied in the same manner to both takings theories, was properly before the jury and would have been properly before the jury

even if the trial court had correctly stricken the *Loretto* count from plaintiff's takings claim. We therefore turn to the pleading issues pertaining to the regulatory taking claim.

The state argues that the trial court erred in striking its defense that Boise's proposed logging would constitute a nuisance and that the state cannot be liable for refusing to permit Boise to perform acts that constitute a nuisance and violate the law. In *Lucas*, the Court noted that there would be no taking if "the proscribed use interests were not part of [the property owner's] title to begin with." 505 U.S. at 1027, 112 S.Ct. 2886. The Court further noted that such limitations "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029, 112 S.Ct. 2886. The state's defense at issue here appears to rest on this part of the *Lucas* case.

The state offers no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance. The case on which it relies, *Columbia Fishermen's Union v. St. Helens*, 160 Or. 654, 87 P.2d 195 (1939), concerned a suit by fishermen to enjoin the city of St. Helens from dumping raw sewage into the Columbia River--a practice which, needless to say, was detrimental to the fish population on which the fishermen depended for their livelihoods. That case concluded that the fisherman had standing to maintain an action against the city. *Id.* at 666, 87 P.2d 195.

However, any analogy to the present case is less than clear. The court in *Columbia* indicated that the state could protect its navigable waters from pollution because it had an interest in *ferae naturae* (the fish) in the waters. It does not follow, as the state seems to posit, that any act taken by the state to protect *ferae naturae* on private property is the equivalent to an abatement of a public nuisance or, alternatively, any act by a private party to destroy *ferae naturae* on private property

constitutes a public nuisance. *Cf. State Dept. of Env. Qual. v. Chem. Waste*, 19 Or.App. 712, 719, 528 P.2d 1076 (1974) ("defendant has been 'operating' the site in violation of the Environmentally Hazardous Wastes Statutes from the time they became effective in early 1972, [but] that continuing violation does not require a finding that the site constitutes a public nuisance"). The trial court correctly struck the state's defense that plaintiff's proposed logging constituted a public nuisance.

In its final assignment of error concerning the pleadings, the state argues that the trial court erred in striking its defense that it labeled as "failure to exhaust its administrative remedies." The state argues that Boise's regulatory takings claim is unripe because it did not make an effort to obtain an "incidental take" permit pursuant to 16 USC section 1539(a). *Former* OAR 660-24-809(5) provided that "[e]xceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act." The state argues that, because plaintiff did not attempt to avail itself of this exception, it may not yet assert a takings claim. The trial court granted Boise's motion to strike this defense without stating its reason for doing so. We therefore examine all of the arguments made to the trial court on this issue in order to determine if the trial court erred in striking this defense.

As an initial matter, Boise correctly points out that the state's argument is not so much an exhaustion of remedies argument as it is a ripeness argument. However, the terminology used in the caption is not dispositive here, as the parties clearly addressed the issue in the lower court as a ripeness issue, and Boise does not contend that the state failed to preserve this issue. We do not consider a mislabeling of a caption in the pleadings to be dispositive where the body of the pleading adequately describes the nature of the defense

that is being asserted. *See Curran v. ODOT*, 151 Or.App. 781, 786 n. 4, 951 P.2d 183 (1997) (concluding under similar circumstances that ripeness issue was preserved).

Both parties agree that the relevant concept is laid out in the Court's decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).[7] In *Williamson*, the plaintiff sought to develop certain property based on the preliminary approval of a plat map that had been obtained by its predecessor in interest. The planning commission disapproved the development because it failed to comply with numerous zoning ordinances. *Id.* at 176-83, 105 S.Ct. 3108. Rather than applying for variances from the zoning ordinances, the plaintiff sought just compensation under the Fifth Amendment. The Court looked to its earlier cases, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), and *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), stating that

> "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. 3108.

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[7] In Williamson, the Court explained the distinction between "exhaustion of remedies" and "ripeness" as follows:

> "While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."

The Court quoted from *Hodel*:

> "There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance * * * or a waiver * * *[.] If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue * * * simply is not ripe for judicial resolution." 452 U.S. at 297, 101 S.Ct. 2352.

The *Williamson* Court went on to note that, in *Agins*, the property owners had submitted a plan that was disapproved but, as they had not sought approval of any other type of plan, it "was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." 473 U.S. at 187, 105 S.Ct. 3108. The *Williamson* Court concluded that the claim was unripe for the same reason that the claim in *Hodel* was unripe: had the plaintiff sought and obtained available variances and waivers, the parties might have reached a mutually acceptable solution. *Id.* at 188-90, 105 S.Ct. 3108; *cf. Curran v. ODOT*, 151 Or.App. at 787, 951 P.2d 183 (addressing ripeness problem under Article I, section 18, of the Oregon Constitution, the court concluded that plaintiff's failure to apply for a permit that could have obviated "takings" meant that plaintiff's claim was not ripe); *Larson v. Multnomah County*, 121 Or.App. 119, 122, 854 P.2d 476, *adhered to on recons.* 123 Or.App. 300, 859 P.2d 574 (1993) (recognizing rule that if a landowner has unsuccessfully filed an application but has pursued no alternatives that could lead to approval, a takings claim is unripe).

The state maintains that plaintiff's claim suffers the same flaw as did the claims of the plaintiffs in *Williamson* and

Hodel. The state argues that plaintiff's failure to seek an "incidental take" permit from the United States Fish and Wildlife Service pursuant to 16 USC section 1539(a), which is a prerequisite to any variance under *former* OAR 660-24-809(5) for destruction of northern spotted owl habitat, creates a ripeness problem similar to the ripeness problems of the plaintiffs in *Williamson* and *Hodel* due to their failure to seek variances that could have obviated the problem.

Boise responds by making several points. First, it notes that it is undisputed that, even if Boise had obtained an incidental take permit from the United States Fish and Wildlife Service, the state would not have been obliged to approve Boise's logging plan. That is true; under *former* OAR 660-24-809(5), an incidental take permit is a prerequisite to state approval of a logging plan that destroys spotted owl habitat, but an incidental take permit does not, in itself, guarantee that the logging plan will be approved. However, nothing in *Williamson*, *Hodel* or *Agins* implies that a waiver or variance must be a "sure thing" in order for a plaintiff to be required to pursue such a remedy before bringing a takings claim.

Boise also suggested, in the course of its arguments on this issue to the trial court, that no incidental take permit would have been required in any event, for several reasons. First, Boise asserted that the Endangered Species Act only prohibits "taking" an endangered species, and destroying an endangered species' habitat does not fall within the definition of "take":

> "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 USC Section 1532(19).
>
> We disagree with plaintiff's assertion that the definition of "take" does not encompass destruction of habitat. In *Babbitt v. Sweet Home Chapter, Etc.*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995), the Court upheld an

Interior Department rule that defined "harm" as including destruction of endangered species' habitat. *See also Palila v. Hawaii Dept. of Land and Natural Resources* (*Palila II*), 852 F.2d 1106, 1108 (9th Cir.1988) (same).

Boise also suggested in the trial court that, because the United States Department of Fish and Wildlife had enacted a regulation defining critical habitat for the spotted owl on federal lands but not on private land, Boise somehow was exempted from any requirement that it acquire an "incidental take" permit before taking owls on its private property. Boise argued:

> "[T]he USF & WS had published in the Federal Register its own regulations governing the Northern Spotted Owl. 57 Fed Reg 1796-01 (Jan 15, 1992 WL4601 (F.R.)). In that document it defined the critical habitat for the bird's recovery. It made a specific finding that private lands were not included in critical habitat, even where the surrounding federal lands had been so designated. Clatsop County contains no federal critical habitat areas for the Northern Spotted Owl and even the more than 100,000 acres of State commercial timberlands in the county have not been so designated."

It is unsurprising that the regulation found at 57 Fed Reg 1796 (Jan 15, 1992) referred only to critical habitat on federal lands, given that the regulation pertains only to section 7 of the Endangered Species Act, which is a section that sets forth the obligations of federal agencies in protecting endangered species. The prohibition on "*any person*" taking an endangered species, by contrast, is contained in section 9 of the Act,[8] which has a broader

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[8] 16 USC Section 1538(1) provides, in part:

"(a) Generally:

"(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or

application that Section 7. The "incidental take" provisions are cross-referenced in section 1538, which pertains to "any person." The "incidental take" provisions are not limited to federal agency protection of endangered species under section 7. The summary of the regulation itself stated: "This critical habitat designation provides *additional* protection requirements under section 7 of the Act with regard to activities that are funded, authorized, or carried out by a Federal agency." 57 Fed Reg 1796 (Jan 15, 1992) (emphasis added). We conclude that this regulation has no direct bearing on whether Boise was excused, as a matter of law, from seeking an incidental take permit under the Endangered Species Act as a prerequisite to the ripening of its takings claim against the state.[9]

Finally, Boise has suggested that it may be inferred from one of its trial exhibits that the state as much as admitted that it would not have approved Boise's logging plan even if Boise had applied for an incidental take permit. We understand Boise's argument to be an invocation of the "futility" exception to the ripeness requirement. *See generally Larson*, 121 Or.App. at 122, 854 P.2d 476 (describing "futility" exception).

For two reasons, either of which is independently dispositive, we reject Boise's assertion of futility. First, the question

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wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to -

"* * * * *

"(B) take any such species within the United States or the territorial sea of the United States[.]"

[9] It is possible that the designation of critical habitat on federal lands could, in fact, affect whether or how incidental take permits are granted for taking endangered species on private lands. That, however, has no bearing on whether the state's defense based on Boise's failure to even attempt to get an incidental take permit should have been stricken from the pleadings.

before us is whether the trial court erred in striking the state's defense on the pleadings; that question cannot be answered by reference to a trial exhibit that might, as a factual matter, be determinative of whether the state *prevailed* on that defense. Second, assuming for the sake of argument that that were not the case, the trial exhibit to which Boise refers does not indicate that it would be futile for Boise to obtain an incidental take permit. Rather, it indicates that the state's decision would not depend solely on the issuance of such a permit and that a decision by the federal government that such a permit was not required would not satisfy the Oregon administrative rule. One of the state's trial exhibits, on the other hand, is a letter of advice to Boise from the Assistant Regional Director of the United States Department of the Interior Fish and Wildlife Service indicating that "an incidental take permit is required when otherwise lawful activities will incidentally take a threatened species" and suggesting that they should visit the proposed logging site, after which the agency "should be better able to discuss the situation and advise you regarding [an] incidental take permit." Neither of these trial exhibits, alone or together, indicate that it would have been futile for Boise to pursue an incidental take permit. We conclude that none of Boise's arguments in support of its motion to strike the state's defense that the claim was not ripe are meritorious. The trial court erred in striking the state's defense.

Because of our disposition of this assignment of error, we need not reach the state's numerous assignments of error pertaining to the conduct of the trial.

Reversed and remanded.

APPENDIX E

CIRCUIT/DISTRICT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF CLATSOP
Clatsop County Courthouse
749 Commercial
PO Box 659
Astoria, OR 97103

October 16, 1997

Phillip D. Chadsey
Attorney at Law
Standard Insurance Center
900 S. W. Fifth Avenue, Suite 2300
Portland, Oregon 97204

William F. Cloran
Attorney at Law
Department of Justice
1162 Court Street NE
100 Justice Building
Salem, Oregon 97310-0506

Re: *Boise Cascade Corporation vs. State of Oregon*
Case No. 93-2018

Gentlemen:

I ruled on several motions at the September 22, 1997 hearing. Mr. Chadsey submitted an order reflecting those rulings on September 30, 1997. I signed it today and directed the clerk to file the second amended complaint and answer.

There are two matters under advisement. I will deny defendant's supplemental Rule 21 motion to dismiss for failure to state a claim. I will allow plaintiff's motion for

partial summary judgment on Count 3 of the amended complaint. Mr. Chadsey, please prepare an order that reflects these rulings.

Yours truly,

/s/ Paula Brownhill
Paula Brownhill

APPENDIX F

IN THE CIRCUIT COURT FOR THE
STATE OF OREGON
COUNTY OF CLATSOP

[Filed Nov 21, 1997]

Case No. 93-2018

BOISE CASCADE CORPORATION, a Delaware Corporation
Plaintiff,

v.

STATE OF OREGON, BY AND THROUGH THE
OREGON STATE BOARD OF FORESTRY,
Defendant.

SPECIAL INTERROGATORY VERDICT

We, the Jury, find:

1. Was plaintiff Boise Cascade Corporation required to submit to a physical occupation of its property as a result of the Board of Forestry's order denying its written plan to log the subject property from January 15, 1993?

ANSWER: Yes X No ___

Proceed to question 2.

2. On January 15, 1993, what was the fair market value of the timber that plaintiff was unable to log due to the Board of Forestry's order?

ANSWER: $2,279,233

Proceed to question 3.

3. October 17, 1997, what was the fair market value of the timber?

ANSWER: $1,615,425

DATED November 21, 1997.

/s/ Constance Bourquein
CONSTANCE BOURQUEIN
Presiding Juror

APPENDIX G

IN THE CIRCUIT COURT FOR THE
STATE OF OREGON
COUNTY OF CLATSOP

[Filed Apr 30, 1993]

Case No. 93-2018

BOISE CASCADE CORPORATION, a Delaware Corporation,
Plaintiff,

v.

STATE OF OREGON, BY AND THROUGH THE
OREGON STATE BOARD OF FORESTRY,
Defendant.

Pursuant to the order of dismissal entered in this case on April ____, 1993 and incorporated herewith, it is ORDERED:

1. Judgment is hereby entered in favor of defendant.

2. Plaintiff's Supplemental Complaint is dismissed with prejudice.

3. Costs shall be determined subsequently pursuant to ORCP 68.

Dated this 30 day of April, 1993.

/s/ Thomas E. Edison
THOMAS E. EDISON
Circuit Court Judge

APPENDIX H

COURT OF APPEALS OF OREGON

93-2018; CA A79626

BOISE CASCADE CORPORATION,
a Delaware corporation,
Appellant,

v.

BOARD OF FORESTRY,
Respondent.

Appeal from Circuit Court, Clatsop County
Thomas E. Edison, Judge

Argued and Submitted July 15, 1994.
Decided Dec. 7, 1994.

Before ROSSMAN, P.J., and De MUNIZ and LEESON, JJ.

Plaintiff appeals from the judgment for defendant Board of Forestry ("board") in this inverse condemnation action arising out of the board's refusal to permit logging operations on plaintiff's property in which a spotted owl nesting site is located. Plaintiff contends that the board's refusal gives rise to an uncompensated taking of its property in violation of the Fifth Amendment to the federal constitution and Article I, section 18, of the state constitution. The trial court granted the state's ORCP 21 motion to dismiss on the grounds that the court lacked subject matter jurisdiction, that the action

was not ripe and that plaintiff's complaint [1] failed to state takings claims. We disagree with the trial court that the motion to dismiss was properly granted on any of those grounds, and we reverse and remand.

For purposes of reviewing the granting of a motion to dismiss for failure to state a claim under ORCP 21A(8), we take as true the allegations in the complaint, along with any facts that might be adduced to prove the allegations. *Doyle v. Oregon Bank*, 94 Or.App. 230, 232, 764 P.2d 1379 (1988), *rev. den.* 307 Or. 571, 771 P.2d 1021 (1989).[2] With two exceptions that we will discuss below, the state accepts the statement of facts in plaintiff's opening brief as adequately summarizing the complaint. Accordingly, we take the facts that are material to our discussion from plaintiff's statement:

"Boise Cascade has been the owner of real property in Clatsop County, consisting of approximately 65 acres of commercial timberland, which is known as the 'Walker Creek Unit' * * *. The Walker Creek Unit is the only commercial timberland that plaintiff owns in Clatsop County.

"In October 1988, Boise Cascade acquired the Walker Creek Unit. At that time and all times since, it has been zoned as commercial timberland. The Walker Creek Unit

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[1] We use the generic term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[2] Although the allegations in the complaint do not play the same definitive role with respect to the jurisdictional issue, *see* ORCP 21A(1), the facts concerning it are undisputed, and it is resolvable solely on legal grounds. Ripeness issues fall in a gray area, in that they are not jurisdictional, and they are *usually* presented as matters of defense. However, the ripeness contentions presented here turn in part on a purely legal question and in part on factual questions that cannot be conclusively answered on the basis of this record--whether inside the complaint or out. It is unnecessary for us to decide whether we may look beyond the complaint to resolve the state's ripeness arguments because, at this stage of the case, they fail whether or not we do.

also cannot be developed or used for a commercial purpose that is not authorized by Land Conservation and Development Commission Goal 4 governing forestlands. OAR 660-06-000, et seq. That goal limits commercial activities on such lands to forest operations related to the growing and harvesting of any tree species as defined in ORS 527.620(6) and certain locationally dependent or compatible forest uses. Consistent with that goal, ORS 527.630(1) provides, in part, that 'it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land * * *.' At the time plaintiff acquired the subject property and at all times since, the Oregon Threatened or Endangered Wildlife Species Act, (ORS 496.192(1)), has provided, in part, that it was not intended 'to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land.'

"Plaintiff acquired the Walker Creek Unit with the reasonable economic expectation that it could log the existing merchantable timber on the property and replant it with forest tree species in order to provide future merchantable timber harvests from the unit. The existing merchantable timber on the Walker Creek Unit consists of old and second growth Douglas Fir, Western Red Cedar, and Western Hemlock.

"In August 1990, the Oregon State Forester adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area 'of the best available suitable habitat in the vicinity of the [nest] site.' Also in 1990, a pair of spotted owls were found nesting on a tree within the Walker Creek unit. Old growth timber of the kind found on the Walker Creek Unit is considered to be the best suitable habitat for

spotted owls. The Board subsequently adopted OAR 629-24-809, which requires protection of a 70-acre core area of suitable habitat encompassing the nest site.

"Commercial timberland, consisting of trees that are 70 years or less in age, is not considered to be the 'best' suitable owl habitat if old growth timber is also available in the vicinity of the nest site. In addition to the pair in the Walker Creek Unit, a number of other pairs of spotted owls have been found in Clatsop County. Some of those nest on State of Oregon-owned timberland that does meet the habitat requirements of OAR 629-24-809. Spotted owls have been found in 50- to 60-year old timber in the Buster Creek drainage in Clatsop County. Several pairs of spotted owls have been found in the Jewell area, which is approximately four air miles from the Walker Creek Unit. Spotted owls, including juveniles when they fledge, will often fly 20 miles or more in order to find new suitable habitat.

"On January 7, 1992, plaintiff filed Notification No. 92-521-11022 giving notice to the Oregon State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. Because of the location of protected waters on or near the Walker Creek Unit and the Walker Creek Unit's identification as spotted owl habitat, a written logging plan was required. Plaintiff filed such a plan on February 4, 1992. The plan provided that, if a pair of owls nested in the operations area in 1992, no operation would be conducted during the critical period of use, March 1 to September 30, or until the young owls had fledged, in order to avoid any incidental harm to the owls while they were present in the area. That plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

"On May 5, 1992, plaintiff submitted an amended written logging plan. The amended plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was a different site from the one that had been occupied by a pair of owls in 1990. The amended plan provided that plaintiff would not conduct operations in the area while the owls were present. With respect to the habitat identification requirement, the amended plan specifically provided that there were more than 70 acres of commercial timberland immediately adjacent to the Walker Creek Unit that were owned by the State of Oregon and that could provide habitat for the owls after plaintiff's property had been logged. Except for the subject timber which plaintiff desires to log, there is not sufficient 'suitable spotted owl habitat,' as defined by OAR 629-24-809(1)(a), in the immediate area of the Walker Creek Unit to meet the requirements of that statute. Further, the only known nest trees in the immediate area of the Walker Creek Unit to meet the requirements of that area are located within the unit which plaintiff desires to log. On May 15, 1992, approval of the amended plan was denied. In denying plaintiff's amended plan, the Oregon Department of Forestry identified the core areas consisting of approximately 56 acres of plaintiff's unit, nine acres of another private landowner's timber, and approximately five acres of adjacent timberland owned by the State of Oregon. The Oregon Department of Forestry did advise plaintiff that there were eight acres in its Walker Creek Unit that could be harvested.

"Plaintiff then took a timely appeal of the Oregon Department of Forestry's denial of its amended plan to the Board. As a basis for that appeal, plaintiff claimed that the Board's requirement that plaintiff set aside any part of its merchantable timber, including the nest trees, for spotted owl habitat constituted a taking of such property for a public purpose which requires just compensation under Article I, section 18, to the Oregon Constitution and the Fifth and

Fourteenth Amendments to the United States Constitution. After a contested case hearing was held, on January 6, 1993, the Board refused to waive the 70-acre nest site requirement in order to permit plaintiff to log its Walker Creek Unit, and on January 15, 1993, it entered a final order which affirmed the denial of plaintiff's amended plan. The denial of plaintiff's written plan by the Board was a final administrative action prohibiting plaintiff from logging the subject timber.

"The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged. After logging and replanting, with young forest tree species as required by law, the land would have a fair market value of $500 per acre.

"Since 1987, when the northern spotted owl was designated as a 'threatened species' pursuant to ORS 496.172, et seq., the State of Oregon has continued to sell its own merchantable timber in Clatsop County for the purpose of having it logged in order to provide revenue to various governmental entities and to manage its commercial timberland for future timber production. The State of Oregon has sold stands of merchantable timber that it owns within 20 miles of plaintiff's Walker Creek Unit even after the Board refused to permit plaintiff to log its merchantable timber.

"After the amended plan was denied approval by the Board in January 1993, on February 22, 1993, plaintiff submitted a written plan No. 93-251-11132 to log four acres of its Walker Creek Unit that the Oregon Department of Forestry had previously agreed could be harvested. On March 8, 1993, the Oregon Department of Forestry approved that plan, subject to

the condition that logging operations not begin until October 1, 1993, and end by March 1, 1994, because of the close proximity of those four acres to the spotted owl nest sites in the adjacent core area.

"On March 19, 1993, plaintiff appealed to the Board the temporal condition placed on its right to log the four acres on the basis that the restriction constituted a temporary taking of the subject timber. After a hearing, the Board on April 19, 1993, issued its order refusing to remove the temporal condition which prevents plaintiff from commencing logging operations before October 1, 1993. The Board's action in refusing to remove the temporal condition was a final administrative action which prevents plaintiff from logging its timber in a timely manner.

"Boise Cascade is presently deprived of all economic use of its merchantable timber on the subject four acres."

The two aspects of plaintiff's factual recitation with which the state disagrees are, in the state's words, the allegations that "plaintiff is presently deprived of all economic use of its merchantable timber on land governed by the restriction in OAR 629-24-809," and that the "underlying commercial forestland has no separate economic value until the timber has been logged." The state argues that both allegations are conclusions of law, which should not be considered in determining whether the complaint states a claim. The state also argues that the second allegation is legally wrong, because the timber and the land are not separable property interests, and the land has value notwithstanding regulations on the logging of the timber.

The state is incorrect on both points. The state's argument concerning the separability of the timber and the land is adversely answered by *Hawkins v. City of La Grande*, 315 Or. 57, 70-71, 843 P.2d 400 (1992), and its efforts to distinguish that case do not persuade us. Moreover, for

purposes of our review of the motion to dismiss, the point is close to academic: Plaintiff alleges that, if it cannot log the land, the land has no economically viable or beneficial use. In other words, plaintiff alleges that, at least as of now, it has lost all economic and beneficial use of the land, as well as of the timber, by virtue of the restrictions on logging.

The state's second point apparently is premised on the fact that loss of all economically viable or substantial beneficial use of property is the legal test for whether a regulatory taking can be found under the Fifth Amendment and Article I, section 18, respectively. *See Lucas v. South Carolina Coastal Council*, ____ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 581 P.2d 50 (1978). However, whether such a loss has occurred is also a factual question, and it is an ultimate question of fact in a regulatory takings case.

Plaintiff's pleading of that fact, coupled with the state's choice to proceed by a motion to dismiss, makes the disposition of this appeal turn on what is alleged in the complaint rather than on what the factual and legal merits of the parties' cases may ultimately prove to be. Many of the state's arguments in this appeal present matters that are outside the complaint. As noted, our review of a motion to dismiss for failure to state a claim starts with the premise that all well-pleaded allegations in the complaint are true, and our review is confined to matters that appear in the complaint. ORCP 21A; *Emmert v. O'Brien*, 72 Or.App. 752, 754, 697 P.2d 222 (1985).

For that reason, at *this* stage of the present case, we are in much the same position that the reviewing courts were in *Lucas v. South Carolina Coastal Council, supra.* As the Oregon Supreme Court observed in *Dodd v. Hood River County*, 317 Or. 172, 183 n. 13, 855 P.2d 608 (1993), the state in *Lucas* "chose not to contest at any level the landowner's allegation that his land had been rendered

absolutely worthless" by the regulation in question. Here, the state's motion to dismiss for failure to state a claim concedes plaintiff's corresponding allegation for purposes of the ruling on the motion and of our disposition of the present appeal. The difference between the cases is that, in *Lucas*, the state's failure to deny the contention *at any point* amounted to a confession of ultimate judgment, while in this case the presumption of the allegation's truth extends only to the proceedings on the preliminary motion that is now before us. With the foregoing as prologue, we turn to the parties' specific arguments.

In its first assignment, plaintiff contends that the court erred by ruling that it lacked subject matter jurisdiction. The apparent basis for the ruling, and the principal basis on which the state defends it in this appeal, was that the board's action was taken in the context of a contested case proceeding, and it is subject to exclusive review under applicable provisions of the Administrative Procedures Act (APA). ORS 183.310 *et seq.*; *see* ORS 183.482.[3]

The remedy plaintiff seeks here is compensation for the taking that it contends the board's action has occasioned. If all of plaintiff's material allegations are found to be true, its right to that remedy does not depend on whether the board's orders are reversible on direct review. Stated another way, plaintiff does not seek review in this case of what the board *did* but seeks relief for the taking that it maintains the board action has *caused*. Accordingly, plaintiff contends that an inverse condemnation proceeding is not made unavailable on

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[3] Plaintiff has sought APA review of the board's orders, and we have issued our decision on those petitions simultaneously with this decision. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 552, 886 P2d 1041 (1994). Some of the jurisdictional arguments we address here appear in the parties' briefs in that case rather than in their presentations in this appeal. However, because the issue is jurisdictional, we are free to consider factors the parties do not raise here, as well as those they do.

the ground that there is an exclusive APA remedy, because it is not seeking review of the correctness of the board's orders; rather, plaintiff is contending that, right or wrong, the orders impose a regulation that results in a taking. We agree with plaintiff on that aspect of its jurisdictional argument. This action is not part of the administrative process and is not subject to or restricted by the APA. However, the parties' other jurisdictional contentions require more extensive discussion.

Both parties rely on *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987). The Supreme Court held there that takings claims may be asserted in circuit court inverse condemnation actions, as well as in appeals to the Land Use Board of Appeals (LUBA) from local land use decisions. Each party relies on language in *Dunn* that, read in its selected context, supports the party's position. The state takes the view that *Dunn* supports the proposition that an agency has "primary jurisdiction" to decide whether its regulation gives rise to a taking; only after the agency has made that determination does circuit court authority arise to decide actions that can culminate in monetary relief. According to the state, not until an agency has decided whether a taking would result from its regulatory action can it be appropriate for damages to be considered; up to that point, the agency has the right to change its regulatory decision and thereby avoid both the need for compensating a landowner and the circuit court proceeding that could result in that remedy. Hence, the state concludes that the circuit courts do not obtain jurisdiction before the agency has decided initially whether a regulatory taking has resulted from its regulatory action.

In *Springer v. City of Bend*, 111 Or.App. 136, 826 P.2d 1, *rev. den.* 313 Or. 354, 833 P.2d 1283 (1992), and *Nelson v. City of Lake Oswego*, 126 Or.App. 416, 869 P.2d 350 (1994), we addressed the effect of *Dunn* on circuit court jurisdiction

and authority over inverse condemnation claims. We said in *Springer* that the Supreme Court had concluded in *Dunn*:

> "[A]lthough damages for inverse condemnation could only be recovered in a judicial action, 'regulatory takings' issues could arise as constitutional questions and be relevant in LUBA's disposition of appeals from local land use decisions. The court concluded that inverse condemnation issues could be asserted in both forums.
>
> "Circuit courts have always had jurisdiction--exclusive *or* concurrent--to try inverse condemnation claims; neither [the Supreme Court's nor this court's] opinion in *Dunn* did anything to change that, and both in fact reiterated it."

111 Or.App. at 138-39, 826 P.2d 1. (Emphasis in original; footnote omitted.)

However, we also noted in *Springer*:

> "The Supreme Court suggested that there might be circumstances in which a circuit court must delay a decision on an inverse condemnation claim until LUBA has decided a corresponding issue that is pending before it."

111 Or.App. at 139 n. 1, 826 P.2d 1.

If the question here was whether LUBA or the circuit court had initial *authority* to decide the question, we might agree with the distinction that the state draws as it applies to that agency's initial authority and the circuit court's.[4] For a

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[4] The court in *Dunn* summarized its holding:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in [the] circuit court. If the owner seeks invalidation of the land use decision or

number of reasons, however, we cannot agree with the state's argument that, under *Dunn* or our cases, the circuit court lacked *jurisdiction* over this action. First, both *Dunn* and *Springer* make clear that the circuit courts *retain* their historical jurisdiction over inverse condemnation claims. *Dunn* does not purport to change that but, rather, holds that the statutes governing LUBA review *add* a form of concurrent LUBA jurisdiction; *Dunn* also holds that issues relating to the sequence of LUBA's and the courts' authority to act will arise in some contexts. However, neither of those holdings divests the circuit court of subject matter jurisdiction over inverse condemnation actions. They simply address the allocation or timing of authority between bodies that share jurisdiction.

The other reasons for our conclusion stem from the fact that the issue in this case does not involve LUBA's authority to decide takings questions; instead, the state asserts that agencies other than LUBA, whose regulations purportedly give rise to takings, have initial jurisdiction of the kind defined in *Dunn* to decide whether their own actions have occasioned takings. However, the court in *Dunn* did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies; rather, the *Dunn* decision was based very specifically on the statutes that confer jurisdiction on LUBA to review land use

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compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision. The special provision for taking evidence beyond the record made before the local government, ORS 197.830(1), as was done here, shows that a full LUBA review of whatever may bear on the constitutionality of a land use decision was not beyond legislative contemplation."

303 Or. at 209, 735 P.2d 609.

decisions and constitutional questions that arise in connection with them. *See* ORS 197.835(7)(a)(E). On the basis of that statutory analysis, the court concluded that the legislature has conferred jurisdiction on LUBA to share part of the circuit courts' historical decisional authority over takings questions.

The state attempts by analogy to equate LUBA's role and the board's under the *Dunn* rationale. The analogy does not succeed because, *inter alia*, LUBA is an adjudicative agency, while the board is the regulatory agency whose action is subject to adjudication to determine if it has resulted in a taking. The proper analogy is not between the board and LUBA, but between the board and a governmental body, as described in *Dunn*, that chooses to "[defend] the validity of its regulatory decision" before LUBA or the courts. 303 Or. at 209, 735 P.2d 609.

Whether it is performed by LUBA or the courts, the determination of whether a regulatory action results in a taking of private property is an adjudicative act. Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be dependent on a showing of facts that cannot even be known at the time that the regulatory decision is made, *e.g.*, the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the

exclusion of the circuit courts, to decide whether their own consummated regulatory actions have resulted in takings.[5]

We reject the state's jurisdictional argument, and we conclude that the trial court erred by ruling that it lacked jurisdiction. We turn to the ripeness issue. It is unclear whether the state's contention that the APA provides plaintiff's exclusive remedy is meant to relate solely to jurisdiction, or is also meant to suggest that the action is not ripe, because plaintiff did not exhaust available appeals from the board's orders to reviewing bodies before bringing this action. If the latter point is intended, we rejected a materially similar contention in *Nelson v. City of Lake Oswego, supra*, and we reject the present variation of it as well. The state's other ripeness arguments depend on facts that cannot be determined from the complaint or the record before us. *See* n. 2, *supra*. We hold that it was error to dismiss the action on ripeness grounds.

The remaining question is whether the trial court was correct in ruling that plaintiff's complaint fails to state a claim. The state makes a number of arguments that are directed against specific allegations and theories that plaintiff pleads. However, the state also makes one argument attacking the sufficiency of plaintiff's complaint as a whole. It contends that plaintiff did not and cannot plead that the alleged taking was an act by "a state agency authorized to exercise the power of eminent domain." According to the state, the board has no authority to condemn property. The state argues that that is an essential element of an inverse

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[5] We need not decide here whether the board has *any decisional* authority over such questions. The issue is whether the circuit court has jurisdiction. *See also Boise Cascade Corp. v. Board of Forestry, supra*, 131 Or.App. at 555 n. 1, 886 P.2d at 1043 n. 1.

We note that there was no "land use decision" or other event here that could have been appealed to LUBA. The board is the only agency that was or could have been involved in the relevant final decisions.

condemnation claim under *Tomasek v. State*, 196 Or. 120, 147, 248 P.2d 703 (1952), and later cases that follow it. However, the state reads *Tomasek* too literally; on the page of its opinion following the language on which the state relies, the court rejected as an "erroneous premise" the defendant's contention "that a distinction is to be drawn between the state itself and its agencies." 196 Or at 148, 248 P.2d 703.

More fundamentally, unlike the present case, *Tomasek* did not involve an alleged *regulatory* taking. Assuming that the state correctly reads *Tomasek* in its own context, the principle the state derives from it has no logical application in the regulatory takings context. It would be nonsensical to hold that there can be no regulatory taking claim if the regulatory agency whose action allegedly causes the taking happens not to have the power to condemn as well as the power to regulate. Even assuming that the Fifth Amendment would permit the state to make inverse condemnation proceedings unavailable for regulatory taking claims that are unrelated to the potential exercise of the eminent domain power, *Dunn v. City of Redmond, supra*, and *Springer v. City of Bend, supra*, make it clear that such proceedings are available for that purpose in this state.

Although plaintiff pleads a variety of *theories*, it has attempted to state only two *claims*: that there has been a taking of the "core" area of its property and that there has been a temporary taking of the four-acre tract that was subject to the board's "temporal" restriction on logging. In both contexts, plaintiff alleges, in essence, that the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under both constitutions as to the principal part of the property, *see Lucas v. South Carolina Coastal Council, supra*; *Fifth Avenue Corp. v. Washington Co., supra*, and a temporary taking of the four-acre part. *See First Lutheran*

Church v. Los Angeles County, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Because the motion to dismiss was directed against and allowed as to the entire complaint, it is unnecessary for us to decide whether any or all of plaintiff's alternative taking theories may prove to be factually or legally tenable. We nevertheless note that, even assuming the correctness of plaintiff's legal premises, the presence or absence of the requisite facts to support plaintiff's permanent physical occupation and its reasonable investment-backed expectations theories cannot be determined without further evidentiary development.

The parties' remaining arguments either require no further separate discussion or relate to matters that are beyond the reviewable record.

Reversed and remanded.

APPENDIX I

SUPREME COURT OF OREGON

CC 93-2018; CA A79626; SC S42159.

BOISE CASCADE CORPORATION,
a Delaware corporation,
Respondent on Review,

v.

BOARD OF FORESTRY,
Petitioner on Review.

Argued and Submitted Jan. 10, 1996.
Decided April 10, 1997.

OPINION

Before CARSON, C.J., and GILLETTE, VAN HOOMISSEN, FADELEY and DURHAM, JJ.*

This is an inverse condemnation case in which plaintiff Boise Cascade asserts that the defendant State of Oregon, acting through its Board of Forestry, has "taken" certain property of Boise Cascade by promulgating a rule that, Boise Cascade alleges, denies Boise Cascade all beneficial use of the property.[1] The state seeks review of a decision of the

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* Unis, J., retired June 30, 1996, and did not participate in this decision; Graber, J., did not participate in the consideration or decision of this case.

[1] "Inverse condemnation" refers to a claim "against a governmental agency to recover the value of property taken by the agency although no formal exercise of the power of eminent domain has been completed by the taking agency." *Lincoln Loan v. State Hwy. Comm.*, 274 Or. 49, 51 n. 1, 545 P.2d 105 (1976) (citing *Thornburg v. Port of Portland*, 233 Or. 178, 180, 376 P.2d 100 (1963)).

Court of Appeals, which reversed a circuit court order that dismissed plaintiff's inverse condemnation action under ORCP 21[2] on several grounds. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033 (1994) ("*Boise I*").[3] There are two issues before us: (1) whether, in an inverse condemnation proceeding of this kind, a court should (or must) stay its own proceeding until the agency first has an opportunity to determine whether the application of its rule effected a "taking" and, if not, (2) whether plaintiff has stated a claim in this case. We conclude that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in

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"'Eminent domain' is the power inherent in a sovereign state of taking or of authorizing the taking of any property within its jurisdiction for a public use or benefit." *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 466, 900 P.2d 495 (1995) (citing *Dept. of Trans. v. Lundberg*, 312 Or. 568, 571 n. 1, 825 P.2d 641 (1992)).

[2] ORCP 21 A(8) provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (8) failure to state ultimate facts sufficient to constitute a claim[.]"

[3] Boise I was consolidated for purposes of oral argument in this court with our review of *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 552, 886 P.2d 1041 (1994) ("*Boise II*"). *Boise II* involves two petitions for judicial review of two final orders of the Board of Forestry. The first final order, dated January 15, 1993, denied plaintiff's plan to log the same 64-acre property owned by plaintiff that is the subject of the present case. The second final order, dated April 19, 1993, approved plaintiff's plan to log four acres within the larger parcel, subject to a temporal restriction that no logging occur during spotted owl nesting season. Plaintiff sought judicial review of both final orders in the Court of Appeals. The Court of Appeals consolidated the two administrative petitions (*Boise II*), but did not consolidate the circuit court appeal (*Boise I*) with *Boise II*.

this case. We also conclude that certain of the allegations in plaintiff's complaint are sufficient to survive a motion to dismiss.

FACTS

In February 1992, plaintiff filed a proposal with the Oregon Department of Forestry ("the Department") to log a 64-acre parcel of plaintiff's land (the "Walker Creek Unit").[4]

The land contains northern spotted owl nests and is subject to the northern spotted owl protection provisions of OAR 629-24-809, which the Board of Forestry ("the Board") adopted in 1990.[5] The Department denied the proposal on the

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[4] The Oregon Blue Book adequately describes the relationship between the Board of Forestry, State Department of Forestry, and the State Forester as follows:

> "The seven-member board [of forestry], appointed by the governor, makes policy and provides vision to the overall management and protection of the state's 11 million acres of state-owned and private forest land. It operates under ORS chapter 526 in setting forest policy for the state. The board authorizes a forestry program for Oregon designed to assure an adequate future wood supply to benefit society, the economy and the environment.
>
> "The Department of Forestry, authorized by ORS 526.008 and established in 1911, is under the direction of the state forester, who is appointed by the Board of Forestry. The statutes direct the state forester to act on all matters pertaining to forestry, the protection of forest lands and the conservation of forest resources."

Claire Levine, ed., *1995-96 Oregon Blue Book*, 67 (1995).

[5] OAR 629-24-809 provides, in part:

> "(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

ground that the logging plan did not provide sufficient protection for spotted owl habitat, as required by OAR 629-24-809.

In May 1992, plaintiff submitted an amended logging plan. The Department again denied the proposal, pursuant to OAR 629-24-809, but advised plaintiff that eight specified acres of the Walker Creek Unit could be logged, if the logging did not take place either between March 1 and September 30, 1992 (which was the critical period of use), or until young spotted owls fledged. Plaintiff appealed that decision to the Board arguing, inter alia, that such an application of OAR 629-24-809 to its Walker Creek Unit property effected a "taking" of that property under the state and federal constitutions.

On January 15, 1993, the Board rejected plaintiff's challenge and entered a final order denying plaintiff's logging plan for the 64 acres. With respect to plaintiff's "takings" argument, the Board stated:

> "Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts * * * that such an argument is not premature, it did not at hearing attempt to present evidence that any 'taking' had in fact occurred. * * * Certainly[,] there is an inadequate factual basis upon which to advance any claim of a constitutional taking."

On February 1, 1993, plaintiff filed this inverse condemnation action in Clatsop County Circuit Court,

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> "(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> "(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year."

alleging that the Board's application of its administrative rule constituted a "taking" under Article I, section 18, of the Oregon Constitution, and under the Fifth Amendment to the United States Constitution.[6] (*Boise I*).

On February 22, 1993, after it had filed the present action, plaintiff submitted a plan to log four of the eight acres that the Department previously had agreed could be harvested. On March 8, 1993, the Department approved plaintiff's plan, subject to a condition that the logging not begin until October 1, 1993, and end by March 1, 1994, when no nesting would take place. Plaintiff appealed that temporal restriction to the Board and argued, *inter alia*, that the temporal restriction also constituted a temporary "taking" under the state and federal constitutions.

On March 17, 1993, while its second "takings" claim concerning the four-acre parcel still was pending before the Board, plaintiff petitioned the Court of Appeals for judicial review of the Board's January 15, 1993, order. (*Boise II*).

On April 19, 1993, the Board rejected plaintiff's challenge to the temporal restriction concerning the four acres and entered a second final order. In that order, the Board *did not*

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[6] Article I, section 18, of the Oregon Constitution, provides:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered[.]"

The Fifth Amendment to the United States Constitution, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Takings Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

address the "takings" issue. Rather, the Board stated that "[t]he issue of whether there is a taking would more properly be [addressed] in a court of competent jurisdiction, once administrative remedies are exhausted."

On April 22, 1993, plaintiff filed a supplemental complaint in the present circuit court action, alleging that the separate temporal restriction on logging the four acres constituted a separate "taking." (*Boise I*).

On April 26, 1993, plaintiff filed a second petition for judicial review, seeking review of the Board's April 19, 1993, order that refused to remove the temporal condition on logging of the four acres. As noted, the Court of Appeals consolidated that proceeding with the earlier administrative review proceeding. (*Boise II*).

In May 1993, the circuit court granted the state's motion to dismiss the entire inverse condemnation claim on the grounds that the court lacked subject matter jurisdiction over the dispute, that the action was not ripe, and that the complaint failed to state a claim. (*Boise I*). Plaintiff appealed the circuit court's ruling to the Court of Appeals, which reversed the dismissal of plaintiff's inverse condemnation claim on all three grounds. The state petitioned for review.[7]

DISCUSSION

I. *Jurisdiction*

The first issue presented is whether, as the state argues, in a regulatory "takings" claim, the agency that promulgated the rule that is alleged to effect a "taking" has primary jurisdiction to determine whether the application of that rule

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[7] We reject the state's ripeness arguments for the reasons stated in the Court of Appeals' opinion. *Boise I*, 131 Or.App. at 540 n. 2, 886 P.2d 1033.

does, in fact, constitute a "taking."[8] The Court of Appeals held that the Board and the circuit court have *concurrent* jurisdiction over plaintiff's "takings" claims, but declined to decide whether the Board has any "decisional authority" initially to decide the "takings" issue. *Boise I*, 131 Or.App. at 546-49, 886 P.2d 1033. The state advances two arguments on review: (1) The Board has "exclusive" jurisdiction, to the exclusion of the circuit court, to decide the "takings" issue; or, (2) alternatively, a regulatory "takings" claim must be resolved, in the first instance, by the agency whose rule is alleged to have effected a "taking," because the agency has "primary jurisdiction" over such claims.

There are two types of "primary" jurisdiction. First, *statutory* primary jurisdiction exists when a statute "specifically requires courts to apply the primary jurisdiction doctrine to a class of disputes." Kenneth Culp Davis and Richard J. Pierce, Jr., II, *Administrative Law Treatise* § 14.1, 276 (3d ed. 1994) (hereafter "Davis and Pierce").[9] Second,

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[8] The doctrine of "primary" jurisdiction is defined as a doctrine under which, "where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Black's Law Dictionary* 1190-91 (6th ed. 1990). An even clearer and more comprehensive definition appears in a standard layman's dictionary: "[T]he right or responsibility of an administrative or regulatory agency to pass initially on controversies involving matters of fact or discretion within its sphere before relief is sought in the courts[.]" *Webster's Third New Int'l Dictionary* 1800 (unabridged ed. 1993). "Exclusive" jurisdiction is defined as jurisdiction "to the exclusion of all other [tribunals]." *Black's*, at 564. "Concurrent" jurisdiction means, in this case, that a court and administrative agency share "[a]uthority * * * to deal with the same subject matter." *Id.* at 291.

[9] For example, Professor Davis notes that "Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., provid[es] for nonjudicial and nonadversary resolution of claims and provid[es] that a complainant in a state or locality with a fair employment commission must first go to that commission with his claim." Davis and Pierce, § 14.1 at 276.

by contrast, "[i]n the bulk of cases * * *, primary jurisdiction is a judge-made doctrine. Its scope and effect are determined by judicial reasoning." *Ibid.* There is no statute that addresses the issue before us; the state in this case is asserting the latter type of primary jurisdiction.

Judicial invocation of the doctrine of primary jurisdiction generally is appropriate when a court decides that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute that fall within that agency's statutory authority. The purpose behind the doctrine is the "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." Kenneth Culp Davis, *Administrative Law Text* § 19.01, 374 (3d ed.1972). The reason for the doctrine is "not a belief that an agency's expertise makes it superior to a court; [but] that a court confronted with problems within an agency's areas of specialization should have the advantage of whatever contributions the agency can make to the solutions." *Id.*, § 19.06 at 381. That is, the doctrine is one ordinarily invoked by a court in the traditional judicial system with the belief that a previous agency disposition of one or more issues before the court will assist the court in resolving the case before it.

Courts vary in their approaches to invoking the doctrine of primary jurisdiction. According to one treatise on administrative law, with which we agree:

> "There is no fixed formula for determining whether an agency has primary jurisdiction over a dispute or an issue raised in a dispute. In making such determinations, courts consider several factors, including (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse

> impact on the agency's performance of its regulatory responsibilities."

Davis and Pierce, § 14.1 at 272. The authors also observe, however, that, "[i]ncreasingly, * * * courts balance the considerations that favor allocation of initial decisionmaking responsibility to an agency against the likelihood that application of primary jurisdiction will unduly delay resolution of the dispute before the court." *Ibid.*

Upon invoking the doctrine of primary jurisdiction, the disposition of the case depends on the nature of the parties' dispute and the scope of the agency's authority. If an agency has primary jurisdiction over the entire dispute, the court action is dismissed. However, if an agency has primary jurisdiction over an issue in dispute,

> "the court will defer any decision in the action before it until the agency has addressed the issue that is within its primary jurisdiction. The court retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it cannot resolve that dispute until the agency has resolved the issue that is in its primary jurisdiction."

Davis and Pierce, § 14.1 at 271.

We now turn to the present case. The state argued in the Court of Appeals that the Board has primary jurisdiction over the "takings" claim under *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987).[10] The Court of Appeals rejected that argument for two reasons. First, the court concluded that Dunn did not hold that circuit courts lack jurisdiction over inverse condemnation claims. Rather, that case concerned the sequence of the Land Use Board of Appeals ("LUBA") and the circuit court's authority to act in some contexts, where

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[10] The facts and procedural history of Dunn are discussed below, 325 Or. at 195, 935 P.2d at 418.

both land use and "takings" issues were asserted and intertwined. *Boise I*, 131 Or.App. at 548, 886 P.2d 1033. Second, the Court of Appeals observed that Dunn dealt with LUBA's authority to decide "takings" questions and "did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies." *Ibid.*

The Court of Appeals also observed that LUBA is an adjudicative agency, while the Board is a regulatory agency, and that "the determination of whether a regulatory action results in a taking of private property is an adjudicative act." *Id.* at 549, 886 P.2d 1033. The court stated:

> "Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be dependent on a showing of facts that cannot even be known at the time that the regulatory decision is made, e.g., the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the exclusion of the circuit courts, to decide whether their own consummated regulatory actions have resulted in takings."

Ibid. (footnote omitted).

On review, the state challenges what it describes as the Court of Appeals' "overly narrow" application of *Dunn*. The state concedes that Dunn arose in a different context from this case, but argues that the rationale underlying *Dunn* supports

the conclusion that the agency has *primary jurisdiction* to resolve a regulatory "takings" claim in this case.[11] In the state's view, *Dunn* "stands for the proposition that the forum jurisdiction issue requires an examination, first and foremost, of the statutory scheme that the legislature has put into place" and for the proposition that "the legislature may place jurisdiction over takings claims in an administrative venue, and that legislative choice will be respected by the courts."

The state observes that the Board, like other administrative agencies, has authority to consider a complaint that includes constitutional claims. From that fact, the state reasons that the Board has authority to resolve a "takings" claim. According to the state, "[t]he fact that the board has the authority to adjudicate constitutional challenges to its own rule, and that under the APA [Oregon Administrative Procedures Act (ORS chapter 183)] its decisions are subject to full judicial review, should have led the Court of Appeals to conclude that the board has primary, if not exclusive, jurisdiction over the takings challenge." The state also argues, *inter alia*, that an inverse condemnation action in circuit court is duplicative and unnecessary, because administrative proceedings and judicial review of those proceedings adequately protect the constitutional interests at stake.

At the outset, we note that the state's reliance on Dunn is misplaced. In *Dunn*, a petitioner sought judicial review of LUBA's determination that two city ordinances did not constitute a "taking" of petitioner's land. The landowner argued that the ordinances allowed the city to "take" property, in violation of the state and federal constitutions. The Court of Appeals did not reach the merits of that claim, because it decided *sua sponte* that the challenged actions were beyond

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[11] In the alternative, the state argues that the Court of Appeals should have concluded "that the board has primary, *if not exclusive*, jurisdiction over the takings challenge." (Emphasis added.)

LUBA's jurisdiction and ordered LUBA to dismiss the proceeding. *Dunn v. City of Redmond*, 82 Or.App. 36, 727 P.2d 145 (1986).

On review, this court noted that "Oregon land use law assigns * * * LUBA 'exclusive jurisdiction' to review a 'land use decision,' including review of its constitutionality. ORS 197.825, 197.835(8)(a)(E)." *Dunn*, 303 Or. at 203, 735 P.2d 609. The court also noted that, under the applicable statutes, LUBA could "reverse or remand" an unconstitutional land use decision. On the other hand, LUBA could not "award compensation when the constitutional claim is that the challenged decision takes private property for public use without just compensation." *Id.* at 204, 735 P.2d 609. The court stated:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the [circuit] court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision."

Id. at 209, 735 P.2d 609. *Dunn* rejected the Court of Appeals' conclusion that "LUBA loses jurisdiction whenever 'a taking claim is asserted,' even if the petition asserts that claim in an effort to invalidate a land use decision rather than to obtain compensation." *Id.* at 208, 735 P.2d 609.

In contrast to *Dunn*, this case does not involve a legislative grant of "exclusive jurisdiction" to an agency such as LUBA

to consider plaintiff's claim. Rather, this case involves a circuit court challenge to final orders that the Board had the authority to enter. The alleged *effect* of the final orders was to preclude plaintiff from using its land. In our view, *Dunn* makes it clear that the fact that plaintiff's inverse condemnation claim *stems from* an agency order does not preclude the circuit court from exercising jurisdiction. The issue presented—whether a "taking" occurred—is a constitutional question, and the context within which it is raised, an inverse condemnation action, traditionally falls within an area adjudicated by courts. Therefore, the traditional rationales for primary jurisdiction, such as agency expertise, collateral estoppel, and efficiency either are not applicable or are present only to a diminished degree.

Moreover, in this case, "the special competence of an administrative body" is not required to determine whether the application of OAR 629-24-809 effected a "taking" of plaintiff's land. *Cf.* Kenneth Culp Davis, *Administrative Law* 121 (6th ed.1977) ("a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer"). Likewise, other justifications for invoking the doctrine of primary jurisdiction, such as a need for uniform resolution of the legal issue involved or a consideration whether judicial resolution of the issue may adversely impact the agency's performance of its regulatory responsibilities, are not present in this context. Accordingly, it is not appropriate in this case to prevent the circuit court from exercising its jurisdiction over plaintiff's "takings" claim by invoking the doctrine of primary jurisdiction. That being so, we hold that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in this case. It follows that the trial court erred in dismissing the action for lack of subject matter jurisdiction.

II. *"Takings" by inverse condemnation under the Oregon Constitution*

Because this case comes to us on appeal of a judgment of dismissal, we next must determine whether plaintiff's complaint states a claim for relief.[12] For purposes of reviewing a motion to dismiss, we assume the truth of all well-pleaded facts alleged in the complaint and give plaintiff the benefit of all favorable inferences that may be drawn from those facts. *Stringer v. Car Data Systems, Inc.*, 314 Or. 576, 584, 841 P.2d 1183 (1992); *Oksenholt v. Lederle Laboratories*, 294 Or. 213, 215, 656 P.2d 293 (1982). In order to determine whether the complaint states a claim for relief, we first must discern what is required to establish a "takings" claim under Oregon law.[13]

Our decisional law demonstrates that there are at least two different ways in which governmental action may result in a "taking" by inverse condemnation under Article I, section 18, of the Oregon Constitution. The first arises when a present governmental action creates an expectation that the private land in question eventually will be taken for a public use. *See Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 613, 581 P.2d 50 (1978) (illustrating concept). In such circumstances, a property owner must prove that the owner is precluded from "all economically feasible private uses [of the property] pending eventual taking for public use" or that "the designation [of the property for eventual public use] results in such governmental intrusion as to inflict virtually irreversible damage." *Id.* at 613-14, 581 P.2d 50.

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[12] We use the term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[13] This court considers state constitutional claims before considering federal constitutional claims. *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983); *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981).

The second category of "takings" by inverse condemnation occurs when the government acts to "intervene[ ] to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others." *Fifth Avenue Corp.*, 282 Or. at 613, 581 P.2d 50 (quoting *Fred F. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, 384-86 (citing Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62-63 (1964)), *cert. den.* 429 U.S. 990, 97 S.Ct. 515, 50 L.Ed.2d 602 (1976)). To establish a "taking" in the latter context, the test is essentially the same as under the former: The property owner must show that the application of the government's particular choice deprives the owner of *all economically viable use of the property*. *Fifth Avenue Corp.*, 282 Or. at 609, 613, 581 P.2d 50. If the owner has "some substantial beneficial use" of the property remaining, then the owner fails to meet the test. *Dodd v. Hood River County*, 317 Or. 172, 184-86, 855 P.2d 608 (1993).

In this case, plaintiff has alleged in both its claims for relief that the Board's application of OAR 629-24-809 to its proposed logging plans denied plaintiff all economic use of its land.[14] With respect to the first claim for relief, the

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[14] Plaintiff's complaint outlines the lengthy procedural facts set forth above, which we will not repeat. The complaint also alleges, in part:

> "Plaintiff asserts two claims for inverse condemnation based on the Oregon and U.S. Constitutions. The first claim seeks just compensation for this regulatory taking, *which deprives plaintiff of the only economically viable use of approximately 56 acres of the merchantable timber*. The second claim involves a *temporal restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, which constitutes a temporary taking of plaintiff's timber for a public use*."
>
> "FIRST CLAIM FOR RELIEF
>
> "*The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log*

plaintiff has alleged "depriv[ation] * * * of the only economically viable use of approximately 56 acres of merchantable timber." Assuming the truth of all well-pleaded facts alleged in the complaint and giving plaintiff the benefit of all favorable inferences that may be drawn from those facts, that allegation is sufficient to meet the "deprivation of all economically viable use of the property" standard. The Court of Appeals was correct in so holding.

With respect to the second claim for relief, plaintiff has alleged two things: (1) The "*temporal* restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, * * * constitutes a *temporary* taking of plaintiff's timber for a public use," and (2) "[p]laintiff is *presently* deprived of all economic use of its merchantable timber on the subject four acres." (Emphasis added.) In other words, plaintiff alleges a *temporary* deprivation of all economically viable use of the four acres *during the six-month period* when the temporal restriction was in effect.

Both this court and the United States Supreme Court have recognized that, under certain circumstances, a "temporary" taking of all economic use of a piece of property may constitute a "taking" under the pertinent provisions of the state and federal constitutions. *See Suess Builders v. City of Beaverton*, 294 Or. 254, 263, 656 P.2d 306 (1982) (decided at least in part under Article I, section 18, of the Oregon Constitution; holding that complaint, liberally construed, could be deemed to allege that one or more local governments

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the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged."

"SECOND CLAIM FOR RELIEF

"*Plaintiff is presently deprived of all economic use of its merchantable timber on the subject four acres.*" (Emphasis added.)

had "temporarily taken all economic use of the plaintiffs' property"); *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2387, 96 L.Ed.2d 250 (1987) (holding to similar effect under Fifth and Fourteenth Amendments to the United States Constitution). But each of those cases was one in which a government regulation or ordinance that was on its face permanent in character allegedly prevented the owners from making *any* economic use of the property in question. By contrast, the allegations here affirmatively establish that, under the regulations, plaintiff *can* utilize the four acres in question for timber production during part of each calendar year. That is, the regulations appear to be permanent, but their interference with plaintiff's use of its property is not temporally comprehensive.

We think that, in order to distinguish between a "taking," on the one hand, and simple administrative inconvenience or delay, on the other, it is necessary to require that a complaining party allege some degree of permanence in its loss. We hold that, in order to assert a claim for a "temporary taking" under the Oregon Constitution, the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its face or so long lived as to make any present economic plans for the property impractical. *See Suess Builders*, 294 Or. at 262-63, 656 P.2d 306 (to that effect). Under such a standard, plaintiff's complaint falls short. It alleges only that, during certain months of each year, it will not be permitted to harvest trees on the parcel. By necessary implication, there is nothing in the regulations that would prohibit harvesting during the balance of the year. To be a "taking," governmental action must be made of sterner stuff.

We understand the federal rule, under *First Lutheran*, to be to the same effect. 482 U.S. at 318, 107 S.Ct. at 2387. The

Court of Appeals erred in holding that plaintiff had alleged a sufficient claim in its second claim for relief.

The state attempts to avoid the entire "takings" question by relying on *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 900 P.2d 495 (1995). The state argues that *GTE* stands for the proposition that express eminent domain authority is the predicate to a compensable "taking." In *GTE*, plaintiff GTE (a telephone local exchange carrier, "LEC") sought review of certain collocation rules adopted by the Public Utility Commission ("PUC").[15] Under the challenged rule, an LEC was required to allow an enhanced services provider ("ESP") to occupy a portion of the LEC's property, for the purpose of placing the ESP's equipment there.

GTE argued that the PUC lacked the statutory authority to promulgate the collocation rules, because the rules allegedly constituted a "taking," in violation of the state and federal constitutions. GTE further argued that, because the PUC lacked the express eminent domain authority that is required before an agency may effect a "taking," the collocation rules are beyond the PUC's statutory authority, no matter how much compensation might be paid for actions taken under them. In other words, GTE argued that the PUC lacked authority to engage in acts, including rulemaking, that effect a "taking," because the PUC lacked *express* eminent domain authority to take property for a public purpose.

This court in *GTE* outlined relevant decisional law and stated:

> "The cases cited above establish a bright-line rule: that an agency may not act in eminent domain without

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[15] "'Collocation' means a service, offered by a[n] LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer." *GTE*, 321 Or. at 462, 900 P.2d 495.

> an express grant of power from the legislature. It is up to the legislature, not the PUC or any other administrative agency, to determine how those powers should be exercised. The legislature's reasons for granting or refusing to grant [to] an administrative agency the power to act in eminent domain may include a desire to refrain from depleting the public fisc. However, the legislature's decision may also be rooted in a number of other policy considerations.
>
> "* * * * *
>
> "In summary, the power of eminent domain may be exercised by an agency only if the agency has express statutory authority. The PUC does not have express statutory authority to promulgate rules that would effect a taking of an LEC's facilities."

321 Or. at 467-68, 900 P.2d 495. The *GTE* court then concluded that the collocation rules effected a "taking" under the federal constitution, and struck them down. *Id.* at 477, 900 P.2d 495.

The state relies on that portion of *GTE* that defines the "bright-line" rule concerning express eminent domain authority. That passage from *GTE* is significant, the state argues, because express eminent domain authority "is a key element of an inverse condemnation claim and of the right to seek compensation for a regulatory taking."

The state misreads *GTE*. *GTE* involved a straightforward eminent domain action in which the issue was whether the state could "take" certain property and, if so, what compensation was owed to the property owner. Unlike *GTE*, this case involves an *inverse condemnation* action in which plaintiff alleges that the state "took" plaintiff's property when it issued two orders that prevented plaintiff from logging on two separate occasions. The "bright-line" rule set forth in *GTE* applies in the eminent domain context. In contrast, in an

inverse condemnation action wherein a plaintiff alleges that a "taking" *has occurred* and the plaintiff seeks damages, *GTE* does *not* require a landowner to prove that an agency has express eminent domain authority as an element to an inverse condemnation action. Rather, the issue in this case is whether the application of OAR 629-24-809 to plaintiff's timber harvest plans *resulted* in a "taking." Plaintiff has alleged that application of the rule in this case *did* result in a taking. *GTE* does not stand for any proposition that would defeat circuit court jurisdiction in such circumstances.

In summary, we conclude that the Board shares concurrent jurisdiction with the circuit court in this case. The Board does not have primary jurisdiction. Consequently, plaintiff's complaint was properly before the circuit court, assuming that it otherwise properly pleaded a claim for relief for inverse condemnation. We hold that it did adequately plead such a claim in its first claim for relief. It did not do so in its second claim for relief.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to that court for proceedings consistent with this opinion.

APPENDIX J

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

[FILED: February 12, 2003]

93-2018; A 1 15966

BOISE CASCADE CORPORATION,
a Delaware corporation,
Appellant,

v.

BOARD OF FORESTRY,
Respondent.

Appeal from Circuit Court, Clatsop County.
Paula Brownhill, Circuit Judge.
Argued and submitted November 14, 2002.

Before Haselton, *Presiding Judge*, and Deits, *Chief Judge*,* and Wollheim, *Judge*.

DEITS, C. J.

Summary judgment in favor of defendant reversed and remanded.

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* Deits, C. J., *vice* Armstrong, J.

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Prevailing party: Appellant	[X] Costs allowed, payable by: Respondent

APPELLATE JUDGMENT

MONEY JUDGMENT

Judgment #1

Creditor(s): Boise Cascade Corporation

Debtor(s): Board of Forestry

Costs: $ 570.60

Attorney fees: $ -0-

TOTAL AMOUNT: $ 570.60

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment COURT OF APPEALS

Effective Date: September 17, 2003 (seal)

APPENDIX K

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 665. SPECIFIED RESOURCE SITE
PROTECTION RULES
Current through August 15, 2000

629-665-0210
Interim Requirements for Northern Spotted Owl Nesting Sites

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which caused owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.

(2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection(1) of this rule is not in lieu of compliance with any federal requirements related to the federal Endangered Species Act.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

APPENDIX L

DEPARTMENT OF FORESTRY

DIVISION 680
RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

629-680-0000
Purpose

(1) OAR 629-680-0000 to 0430 shall be known as the Resource Site Inventory and Protection Process Rules.

(2) The purpose of the rules in OAR 629, Division 680 is to set criteria to inventory and protect special resources described in ORS 527.710 (3)(a) on forestlands regulated by the Forest Practices Act. Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Consistent with ORS 527.630, it is the policy of these rules to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water and fish and wildlife resources that assures the continuous benefits of those resources for future generations of Oregonians.

APPENDIX M

OREGON ADMINISTRATIVE RULES
COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY
AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0010
Definitions

In addition to the definitions listed in OAR 629-600-0100, as used in OAR Chapter 629, Division 680:

(1) "Critical period of use" means the time of year the State Forester determines a species is sensitive to disturbance at a resource site.

(2) "disturbance" means actions which cause birds to flush from the resource site.

(3) "Endangered species" means any fish or wildlife species identified as "endangered" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "endangered" under the Endangered Species Act of 1973 as amended.

(4) "Listed species" means a species adopted by the Board under OAR 629-680-0200.

(5) "Site productivity" means the ability of a resource site to produce the benefits for which it is being protected. As an example, nesting site productivity is measured by the number of young birds successfully raised. For a roosting site, productivity is measured by the number of birds roosting over a given time. Watering site productivity is measured by the number of band- tailed pigeons that visit the resource site over a given time.

(6) Threatened species means any fish or wildlife species identified as threatened on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "threatened" under the Endangered Species Act of 1973 as amended.

APPENDIX N

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

Current through August 15, 2000

629-680-0100

Process for Board Evaluation of Threatened and Endangered Fish and Wildlife Species that use Resource Sites that are Sensitive to Forest Practices

(1) When a species is listed as threatened or endangered by state or federal authorities, the Board shall adopt rules to protect resource sites that are used by those species and that are sensitive to forest practices. The following process shall be used when the Board develops protection rules for these resource sites:

(a) The Board's evaluation shall be based on the best available information summarized in a technical review paper. The paper must be submitted by those proposing protection for resource sites used by a threatened or endangered species. The paper may be written by the State Forester, another agency, an organization or a person. The paper shall demonstrate how the resource sites are sensitive to forest practices. The paper may rely upon information used during the listing process and must:

(A) Identify the resource sites used by the species;

(B) Identify forest practices that conflict with the resource sites;

(C) Evaluate the biological consequences of the identified conflicts; and

(D) Propose protection requirements and exceptions for the resource sites.

(b) The State Forester shall review the technical paper submitted under subsection(1)(a) of this rule. The review shall include an evaluation of the literature used, consultation with technical experts and a technical review by experts chosen by the State Forester. The State Forester shall submit a report of this review to the Board.

(c) The Board shall review and accept or reject the information presented in subsections(1)(a) and (b) of this rule;

(d) Using the technical review paper and the State Forester's report, plus other available information for the species, the Board shall:

(A) Identify the resource sites for the species;

(B) Identify forest practices that conflict with the resource sites and evaluate the consequences of those conflicts;

(C) Determine the protection requirements for the resource sites; and

(D) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for resource sites used by the threatened or endangered species.

(3) The State Forester shall maintain an inventory of protected resource sites that are used by threatened or endangered species.

(4) When a threatened or endangered species is de-listed by the Oregon Fish and Wildlife Commission or the U.S. Fish and Wildlife Service, the Board shall determine whether continued protection of resource sites is warranted:

(a) If the Board determines that continued protection rules are warranted, the rules shall be promulgated under the appropriate statutory authority;

(b) If the Board determines that continued protection rules are not warranted, existing rules shall be repealed.

APPENDIX O

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY
AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0220
Process for Determining Forest Practices Conflicts and Consequences; Protection Requirements for the Resource Site

(1) The following process shall be used by the Board to evaluate forest practices conflicts and consequences and in setting appropriate protection for the resource site. Using the technical review paper developed in OAR 629-680-0200, plus other available information for each listed species, the Board shall:

(a) Identify the resource site for each listed species;

(b) Identify forest practices that conflict with the resource site and evaluate the consequences of those conflicts;

(c) Determine the protection requirements necessary to protect the resource site;

(d) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for each species listed in OAR 629-665-0100.

APPENDIX P

PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL

Including:

o Formal Section 7 Consultation Guidance
o Interim Recovery Strategy
o Conservation Planning for Non-Federal Actions
o Guidance for Incidental Take

U.S. Fish and Wildlife Service

Region 1

July 1990

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OWL PROCEDURES MANUAL

INTRODUCTION

With a listing decision now made for the northern spotted owl and an effective date of July 23, 1990, many people are wondering exactly what changes may occur to timber harvest programs in order to adequately protect the owl. In this document, the U.S. Fish and Wildlife Service (Service) describes its consultation, recovery, law enforcement (taking) guidelines, and conservation planning processes in an attempt to lay out procedures that are consistent with provisions of the Endangered Species Act (ESA), applicable on the effective date for listing of the northern spotted owl. With the cooperation of the other Federal agencies, as well as State and private entities, these guidelines outline the most efficient way of doing business under the ESA, at least for the first year after a listing, and would help meet the goals of other applicable laws and regulations.

PURPOSES

1. To provide clear examples of how ESA processes may work for the spotted owl.

2. To provide clarification of the Service's view of the Interagency Scientific Committee's (ISC) conservation strategy.

3. To put ESA spotted owl guidance in an understandable, manual-type format for distribution to Federal and non-Federal sectors as a working document.

BACKGROUND

o SECTION 7 OF THE ESA—FORMAL CONSULTATION FOR FEDERAL ACTIONS

Federal agencies that fund, authorize, or carry out actions which "may affect" listed species must consult with the Service under Section 7. Federal actions that are nondiscre-

tionary or that have "no adverse effects" on listed species are not subject to formal consultation. For timber harvest activities, the "may affect" standard applies to harvest activities within a ½ mile radius of any known nest site or pair activity center. The Service believes that these actions represent a threshold standard for timber activities requiring formal Section 7 consultation.

Formal consultation always results in a biological opinion issued from the service to the action agency. The opinion always makes a likely to jeopardize" or "not likely to jeopardize" finding for the action subject to formal consultation. The finding takes into account the environmental baseline condition of the listed species, plus the direct, indirect, interrelated, and interdependent effects attributable to the Federal action at hand, together with the cumulative effects of State and private actions reasonably certain to occur in the area of the Federal action.

Biological opinions may contain suggestions for project/action modifications, ranging from reasonable and prudent alternatives (only in a "jeopardy opinion") to reasonable and prudent measures/terms and conditions (mandatory elements of an incidental take statement) to conservation recommendations (suggestions which are left to the discretion of the action agency to implement).

Standards for the determination of incidental take are of particular significance to any future biological opinions for the northern spotted owl. Incidental take of listed species is "take" (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young.

The Service believes that incidental take also occurs for timber harvest activities which may harm or harass northern spotted owls. In order to define such activities which result in

the most subtle type of incidental take, the Service convened a group of its biologists and developed incidental take guidelines which consider the biology of the owl throughout its range. Such guidelines are described later in this document.

o SECTION 9 AND 10 OF THE ESA—TAKE FOR NON-FEDERAL ACTIONS

Take of endangered or threatened species is prohibited under Section 9 of the Endangered Species Act. The 1982 Amendments to the ESA gave the Service a procedure to authorize the incidental take of listed species by non-Federal parties in much the same way a Section 7 consultation (Incidental Take Statement) can authorize incidental take for Federal actions. Private parties whose otherwise lawful actions will result in incidental take of a listed species can apply for a permit authorizing such take by submitting a permit application and a Habitat Conservation Plan (HCP) to the Service.

Conservation Planning is a term that generally refers to the Section 10(a)(1)(B) permit process. This manual will go through the general procedures necessary for a private party to submit a properly prepared permit application for processing.

o SECTION 4 OF THE ESA—RECOVERY STRATEGY

The Service will ultimately have an approved recovery plan for every listed species, as set forth in Section 4 of the ESA. Right now, there are approved recovery plans for less than one-half of all listed species. Recovery plans set forth goals which, once achieved, can result in delisting the subject species.

An approved recovery plan is not necessary to carry out formal consultation under Section 7, to consider permit

applications under Section 10, nor to enforce the prohibitions of "take" under Section 9. Nevertheless, recovery plans are useful planning tools and may help guide and coordinate all conservation gained through Section 7 and Section 10, and focus such conservation actions on recovery and delisting. This manual will focus on the existing knowledge available, especially the ISC report, and make suggestions as to how the agencies can utilize such information as a potential recovery strategy.

DISCUSSION AND EXAMPLES

o FORMAL CONSULTATION UNDER SECTION 7

It is the responsibility of the action agency (e.g., Forest Service and Bureau of Land Management) to determine which actions "may affect" threatened or endangered species, and to initiate consultation with the Service. As noted above, "may affect" situations for the owl are defined as those activities that involve harvest or related activities within spotted owl habitat, and/or harvest activities which may pose disturbances to nesting pairs within ½ mile of any known nest site or pair activity center, regardless of the suitability of the habitat.

Suitable habitat selected by northern spotted owls was described in the (ISC) conservation strategy as typically exhibiting ". . . moderate to high canopy closure; a multiplayered, multispecies canopy dominated by large overstory trees; a high incidence of large trees with large cavities, broken tops, and other indications of decadence; numerous large snags; heavy accumulations of logs and other woody debris on the forest floor; and considerable open space within and beneath the canopy. These attributes are usually found in old growth, but they are sometimes found in younger forests, especially those that contain remnant large trees or patches of large trees from earlier stands. In younger forests that support breeding owls, the nest and major roost sites are

usually found where large trees from the earlier, older stands remain." It is important to note that the age of forests is not as important a factor in determining habitat suitability as are vegetational and structural components. Areas where consideration of spotted owl habitat may be especially important in consultation are: 1) habitat that is currently occupied by owls, 2) Habitat Conservation Area as defined in the ISC conservation strategy, and 3) areas of special concern as defined in the Service's 1989 Status Review Supplement.

Once the action agency has made the "may affect" determination, a written request should be made to the Service for formal consultation. This request should be accompanied by an assessment of the action and its impacts, and contain the following general categories of information (a more detailed outline for a biological assessment is provided in Appendix 1):

1. a description of the action to be considered;

2. a description of the specific area that may be affected by the action;

3. a description of any listed species or critical habitat that may be affected by the action;

4. a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

5. relevant reports, including any environmental impact statement or environmental assessment; and

6. any other relevant available information on the action, the affected listed species, or critical habitat.

After review of this information, the Service then prepares a biological opinion which includes:

1. an analysis of the direct and indirect effects, as well as the effects of interrelated and interdependent

activities, and cumulative effects of reasonably certain State or private activities in the action area;

2. a biological opinion on whether the action is "likely to jeopardize" or "not likely to jeopardize" the continued existence of the species (reasonable and prudent alternatives will generally be provided if the opinion indicates that the proposed action is likely to jeopardize the continued existence of the species);

3. an incidental take statement which will identify the anticipated level of incidental take that will occur, and provide reasonable and prudent measures and terms and conditions for minimizing incidental take; and

4. conservation recommendations that, if implemented, would minimize impacts and promote the conservation of the species.

Reasonable and prudent measures and terms and conditions to minimize incidental take are mandatory, as are reasonable and prudent alternatives in a jeopardy opinion, and should be carried out by the action agency. Implementation of conservation recommendations, although strongly encouraged by the Service, is at the discretion of the action agency. A general outline for biological opinions is shown in Appendix 2.

The Forest Service and Bureau of Land Management (BLM) are considering dividing their sales into 3 categories for purposes of formal consultation:

1. all sold sales sold prior to FY-89;

2. planned and sold sales for FY-89 and 90 (Section 318 sales, and sales previously in conference); and

3. FY-91 planned sales.

Each Federal action "package" will result in a separate biological opinion issued by the Service to the Forest Service and the BLM (assuming both action agencies utilize similar

consultation "packaging"). The Service is committed to issuing biological opinions on categories 1 and 2 within 30 days of receipt of the additional information necessary to complete the administrative record (and as close as possible to any effective date of a listing).

In each biological opinion the Service would provide conservation recommendations and an Incidental Take Statement (where appropriate) based on the Interagency Cooperation Regulations found at 50 CFR Part 402. To display possible results from such opinions, and assuming the occurrence of incidental take, we have prepared a list of examples of reasonable and prudent measures that would minimize or avoid incidental take, and listed conservation recommendations that are applicable to incidental take (see Table 1). We have further divided the list into two parts. Measures and recommendations that are (1) based upon the ISC Conservation Strategy or (2) based upon current management plans. Departure from these "example" reasonable and prudent measures and conservation recommendations may be advised, if through coordination with the Service, it is determined that sound biological data and reasoning indicate that the species would benefit from such a departure.

Appendices 3A and 3B provide examples of possible conservation recommendations, applicable under Section 7(a)(1), that may further promote the conservation of the species. Similarly, the first list (Appendix 3A) is based upon the ISC Conservation Strategy, while the second (Appendix 3B) is based upon current management direction. These recommendations are not mandatory and are intended to provide an opportunity for the agency to further the conservation of the owl.

Comparisons between timber harvest actions "with ISC Strategy" and "without" were made at the request of the Department of the Interior. At the time of this writing, there are no other conservation strategies developed and presented

for similar comparisons. If appropriate, future versions of this manual may analyze the likely conservation actions that would be called for under Section 7 if other, yet unknown, strategies were considered.

In the meantime, the ISC Conservation Strategy represents the most current management advice, developed through a multiagency working group that included the most knowledgeable owl experts. The strategy provides a long-term approach to owl management, consisting of major elements, that in combination comprise an integrated approach to conservation of the species. Deviations from the strategy in the short-term increase risk to its long-term success. Thus, the strategy provides a conservation goal against which all future actions will need to be measured. Since the strategy acknowledges the loss of habitat in conservation areas only through the 1990 sale program, it may be necessary to prepare a new or updated conservation strategy if the ISC's recommendations are not implemented in full prior to contracting 1991 sales.

Table 1. Examples of Reasonable and Prudent Measures Under Conservation in Incidental Take Statements for Federal Actions as Well as Applicable Conservation Recommendations

Reasonable and Prudent Measures and Conservation Recommendations Related to Incidental Take

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report

Sold Sales (pre-89 and FY-89/90 sold sales including sales under Section 318)	Sales are under contract, expense is high to modify contract.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

(continued)

Sales Type 1990 Planned but Unsold Sales, including Sales proposed under Section 318	Limitations on Reasonable and Prudent Measures and Conservation Recommendations Limited time available to make adjustments during the planning process and coordinate the changes before fiscal year 1990 contracting deadlines. Additional expenses may be necessary to make changes.	Basis: Current Agency Management Plan Scenario Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Basis: Agency Implementation of Interagency Scientific Committee Report Reasonable and Prudent Measures: Protect pairs of spotted owls within HCAs by providing a ½ mile buffer around the pairs activity center. Outside HCAs protect 80 acres surrounding pair activity centers (as specified in the ISC Strategy). Implement seasonal restrictions during the nesting season to protect pairs of spotted owls and their progeny.

		Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside proposed HCAs.	Conservation Recommendations: Eliminate or relocate timber harvest to areas outside HCAs.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1991 and Future Sales	No known limitations	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny that are located outside HCAs.

		Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside HCAs.	Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

It is not possible to determine an exact point at which the continued existence of a species would be at jeopardy without fully analyzing proposed actions in relation to the environmental baseline. Therefore, the Service will analyze each Federal action submitted for formal consultation in turn and will make the "likely jeopardy/not likely jeopardy" finding on a case-by-case basis.

o INCIDENTAL TAKE GUIDELINES UNDER SECTIONS 7 AND 10

The taking of any listed species is generally prohibited under Section 9 of the ESA and implementing regulations. There are, however, a number of exceptions to the taking prohibition.

The 1982 Amendments to the ESA gave the Service procedures to authorize the "incidental take" of listed wildlife species. These procedures are contained in Sections 7 and 10 of the ESA. "Incidental take" in this context is take which is "incidental to, and not the purpose of, carrying out otherwise lawful activities" (See 16 USC 1539 and Sec. 10(a)(1)(B) of the ESA).

The Service offers the following general guideance to address "incidental" take of northern spotted owls that may occur incidentally to timber harvest or related activities. The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act.

It is important to note that the Service fully intends to consider all requests for incidental take authorizations under Section 7 (Federal) or Section 10 (State and private) of the Act, as appropriate. These interim guidelines are intended to present, to the best of our ability, guidance for addressing the

need for incidental take authorization; and therefore to provide guidance for reducing potential conflicts with Section 9 of the Act.

An obvious incidental take situation would exist if an otherwise lawful timber harvest activity would result in the direct loss of any individual (adult or young), or an active nest (with young or eggs). It is more difficult to determine when incidental take of owls might occur as a result of altering habitat surrounding a nest site or activity center of a pair of spotted owls.

Even more difficult is assessing when owls may be harmed or harassed by cutting within their home range. In these less obvious situations, the Service recommends that the project proponent initiate a dialogue with the Service to discuss the potential risk of incidental take. In the absence of such a dialogue, the Service offers the following stepwise approach which we believe is a reasonable procedure to reduce the risk that incidental take will occur. If the person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

The focus of our incidental take guidelines is on northern spotted owls, including their eggs and young. We therefore recommend the following stepwise approach to avoid and reduce the risk of incidental take:

1. Conduct spotted ow surveys during the breeding season and prior to any harvest activity according to the Forest Service protocols addressed in the Interagency Scientific Committee report. The Service may suggest other owl survey techniques in the near future. Such surveys should be a standard practice for planning timber harvest activities.

2. Avoid any harvest activity which results in less than 70 acres of the best suitable owl habitat encompassing the nest site and/or activity center of a pair of spotted owls.

3. Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site and/or activity center. The 500 acres may include the 70 acres in No. 2 above and should be as contiguous as possible.

4. Avoid any harvest activity which results in less than 40 percent coverage by suitable owl habitat within a circle with a radius centered on a nest site/or center of activity and as prescribed by physiographic province (see Table 2). The 40 percent may include the acreage required in No. 2 and No. 3 above.

The Service recognizes that there is variation among individuals. Specific information on home range size, habitat use, nest site, or the center of activity of well-studied owls in similar habitat in the same portion of the range could be used to justify an exception to these guidelines and continue to avoid incidental take. In addition, habitat use information on which the above recommendations are based (see ISC 1990, USDI 1990) may change as a result of more recent studies, and the Service will continue to update its database to ensure that the most recent information is included.

To summarize the procedures for pursuing incidental take authorization for non-Federal activities, if incidental take is identified as a concern on State or private lands, individual landowners should consider development of a habitat conservation plan. The Section 10 (a)(1)(B) permit application can be submitted separately by individual applicants or through the appropriate State agency as described in the discussion on Section 10 permits in this

document. The Service strongly encourages a pre-application dialogue with any potential permit applicant at any time.

Table 2. Calculations to Develop Incidental Take Guidelines Based Upon Home Range Size by Physiographic Province [1]

Province	Median Home Range Size		40 Percent of Median Home Range Size
	Acres	Radius	Acres
WASHINGTON			
Olympic Peninsula	9900	2.2 miles	3960
Cascades	6600	1.8 miles	2640
OREGON			
Cascades	2500	1.2 miles	1000
Coast Range	3400	1.3 miles	1360
Klamath	2500	1.2 miles	1000
CALIFORNIA			
Klamath	2500	1.2 miles	1000

[1] The Service will continue to revise this table as more data become available.

References:

Interagency Scientific Committee. 1990. Conservation strategy for the northern spotted owl. Report of the Interagency Scientific Committee to address the conservation of the northern spotted owl. U.S. Department of Agriculture, Forest Service, and U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, and National Park Service. Portland, Oregon.

U.S. Department of the Interior. 1990. 1990 Status

Review. Northern Spotted Owl. Report to the U.S. Fish and Wildlife Service. Portland, Oregon.

o HABITAT CONSERVATION PLANNING UNDER SECTIONS 9 AND 10

A permit from the Service pursuant to Section 10(a)(1)(B) of the ESA authorizes incidental take much as a Section 7 consultation does through an "Incidental Take Statement" for Federal actions. However, Section 10 of the ESA typically applies to non-Federal actions. Individuals, corporations, non-Federal government entities, States, and other parties can apply for an incidental take permit by submitting an application and a habitat conservation plan to the Service. "Conservation Planning" is the term often used to refer to this process. In the case of the owl, the Service recommends maximizing efficiency of effort by developing a habitat conservation plan which includes the incidental take requests for a number of entities through the appropriate State land-managing agency.

The issuance of an incidental take permit by the Service is contingent upon the applicant's development of a Service-approved conservation plan for the listed species affected by the subject project or action (a more detailed document, "Draft Conservation Planning Guidelines," is available from

the Service's Portland Regional Office). Such a conservation plan must specify:

1. the anticipated impacts likely to result in take of listed species;
2. the mitigation and monitoring measures the applicant will undertake to alleviate the impacts of the taking;
3. alternative actions to such taking that were considered;
4. why these alternatives were not employed;
5. funding that will be provided to implement the mitigation measures and attendant conservation plan; and
6. additional measures that the Service may require as necessary or appropriate for the conservation of the species.

Because applicants may have difficulty in adequately addressing these conservation planning needs independently, the Service generally works with an applicant throughout the pre-application phase. Adequate quantification of impacts (i.e., incidental take) usually requires that the applicant: (1) define the conservation planning area, (2) collect necessary biological data on the species of concern, and (3) detail the proposed activities likely resulting in incidental take.

Upon receipt of the application and conservation plan, the Service may issue an incidental take permit if it determines that the following conditions have been met:

1. the taking will be incidental to the action;
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking;

3. the applicant will ensure that adequate funding will be provided for the conservation plan and procedures to deal with unforeseen circumstances;

4. the taking will not appreciably reduce the likelihood of the survival and recovery of the subject species in the wild;

5. the applicant will ensure that other measures required by the Service will be provided; and

6. the plan will be implemented.

The third item above generally requires the development of an implementing agreement, which is a legal document binding all implementing parties to the proposed conservation plan.

The Service must also address the National Environmental Policy Act (NEPA) in the ESA Section 10(a)(1)(B) permit process. In most cases the Service delegates the development of information needed for preparation of NEPA documentation to the applicant to expedite the process. In general, if the incidental take permit will result in a significant net loss of individuals and/or habitat, an EIS likely will be required. This often adds 9 months to 1 year to the process. Conversely, if the permit will result in a net gain or insignificant net loss of individuals and/or habitat, an environmental assessment leading to a finding of no significant impact likely will be sufficient for NEPA compliance. In such a scenario, a permit could be considered for issuance in as little as 3 months.

Section 10 and Northern Spotted Owls

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be party to take on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of ESA.

The implications for the northern spotted owl are considerable, since a large portion of the total harvest volume in the owl's range comes from non-Federal lands. At least in California, important numbers of owls occur on private lands; there are fewer owls on private lands in Washington and Oregon.

There are two approaches to managing the Section 10 process for spotted owls. One is for the individual landowner to prepare an HCP and apply for an incidental take permit for his lands. The second is for the State to prepare an HCP for all state and private timber lands. The Service would prefer to proceed with the latter approach, since it would add efficiency to the conservation planning process.

The States of Washington, Oregon, and California are at different stages in this process. In Washington and Oregon, the Service has notified the States of their potential responsibilities and initial informational discussions are beginning. In California, the State Board of Forestry, Department of Forestry, Department of Fish and Game, industry representatives, and the Service have been meeting regularly since November, 1989.

The State of California is planning to prepare an HCP covering timber management throughout the range of the subspecies in the state. The California HCP and accompanying NEPA process probably may not be completed until sometime in 1991. During the interim period, the State would attempt to prevent take through a review process that supplements its existing timber harvest permit procedure. In the meantime, large industrial timber firms have indicated their intent to proceed with individual HCPs.

o RECOVERY PLANNING UNDER SECTION 4

Section 4(f) of the Endangered Species Act requires development and implementation of recovery plans for listed species. Recovery actions are meant to arrest or reverse the

species' decline and neutralize the threats to its survival so that its long-term survival in the wild can be ensured.

A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of the species. Coordination among Federal, State, local agencies, organizations, and private entities is essential. Although recovery plans do not commit manpower or funds, they must identify site-specific management actions, estimate the time frame and costs for recovery, identify research needs, and establish measurable goals for recovery.

A recovery plan contains three parts. Part 1 is an overview of the species, its biology, life history, habitat requirements, and discussion of the threats that have led to its listing as an endangered or threatened species. Part 2 identifies the Service's goals and objectives for recovery of the listed species. These are presented in a step-down outline that recommends the steps that should be taken to help recover and delist the species. In most cases these recommendations are research oriented. Any recommended management actions may require NEPA documentation prior to implementation. Part 3 provides an implementation schedule that identifies the key players and the costs associated with recommended projects.

Development of a recovery plan requires a public review process prior to approval of the plan. There are no specific time frames associated with the development of a recovery plan, and a plan is not necessary for the Service to conduct Section 7 consultation, carry out research and management activities, or identify goals and objectives for the species. If the Service follows the normal procedure for producing a recovery plan, it is anticipated that two years would be required to complete the necessary steps before a plan would be finalized. A process for developing a recovery plan under these circumstances is described in Appendix 4. Specific

guidelines that describe the recovery planning process are available from the Service.

Interagency Scientific Committee Conservation Strategy

The Fish and Wildlife Service, Forest Service, Bureau of Land Management, and the National Park Service entered into a charter under the 1988 Interagency Agreement on spotted owls to establish an Interagency Scientific Committee (Committee). This Committee was also recognized by Congress in Section 318 of Public Law 101-121. The purpose of this Committee was to assess all available information on the management and biology of the northern subspecies and recommend a strategy for the conservation of the northern spotted owl. The Committee submitted "A Conservation Strategy for the Northern Spotted Owl" to report to Congress and the four agencies on April 4, 1990. The Forest Service must report to Congress on its intentions towards management of the owl by September 30, 1990.

As noted above, the Committee has produced a scientifically credible strategy for the long-term viability of the northern spotted owl. The agencies have endorsed the science associated with this plan, and are presently reviewing it to determine its acceptability as an approach to managing the owl under their multiple-use responsibilities. The Committee has utilized the best scientific information available, including contact with or the participation of all the most knowledgeable spotted owl experts in the process to develop this strategy.

The Service believes that this report represents the most comprehensive and in-depth analysis of the data available. The Service fully endorses the scientific credibility of the report and its applicability as a management approach for the northern spotted owl. Given this, the Service is reviewing this document for its applicability as a recovery plan under the Endangered Species Act (see Appendix 4).

This process followed to produce the ISC's plan has met two of the Service's requirements for development of a recovery plan. First, the most knowledgeable owl experts available, representing all major constituencies, were involved in its development. Secondly, the best available information was used to develop the strategy. Establishment of recovery goals, evaluation of the conservation strategy relative to these goals, and inclusion of a public review process would be required to complete the process.

In the interim, the Service strongly recommends that the agencies consider implementation of the conservation strategy, as fully described by the Committee. Acceptance and implementation of the strategy, as recommended, would provide a sound basis for Section 7 consultation, help address the issue of take on Federal and private lands, and reduce concern over the economic impacts of recovery and species management.

The conservation strategy includes a process for revision of the strategy as more and better information becomes available. In addition, the Service has recently established a coordinating committee under a 1990 interagency agreement (Attachment 5) with the States of California, Oregon and Washington, and the USDA Forest Service, Bureau of Land Management, and National Park Service. The intent of this new agreement is to provide a forum to coordinate the management and conservation of the northern spotted owl. The Services believes that these processes allow for an open and appropriate forum for consideration and inclusion of recovery goals, other issues that may arise, as well as adjustment of the strategy itself that may be required during its implementation.

CONCLUSION: OWL PROCEDURES MANUAL

The Tables and Appendices noted in the narrative are attached. The Owl Procedures Manual will be updated and augmented as new information becomes available. Components of future consultations, such as development of incidental take statements, will generally follow the direction of this manual, but may change based on new biological information and professional judgment.

APPENDICES

to

OWL PROCEDURES MANUAL

APPENDIX 1: Biological Assessment Information

In general, biological assessments for the pre-1989 and 1989-1990 timber sale programs should contain the following information. The Service will work with the agencies to identify the data needs for future sale reviews.

Biological Assessment Format

1. Introduction

   - S Brief summary of the objectives of the Biological Assessment; reference the Forest plans or timber plans under which sales were prepared.
   - S Address other listed species (species for which the "may affect" standard applies, or acknowledgement that such species have been consulted on separately).

2. Description of the Proposed Action

   - S Description of the Forest Service's Pacific Northwest and Pacific Southwest Regions or the BLM Districts in Oregon including total acreage, description and amount of forested acres, and owl habitat information such as amount, distribution, etc., by land area under consideration. This information should be totalled by physiographic province and Forest or BLM District.
   - S Description of the timber sale program being addressed.

S For pre-1989 sales, where discretionary authority is retained, provide the following information, totaled by physiographic province and Forest or BLM District:

a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.)

b. number and list of "no effect" sales and justification for this determination.

c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat.—indicate in the two lists above those sales that are located fully or partially within HCAs, SOHAs, Areas of concern, and/or ODFW/BLM agreement sites.

S For 1989-1990 sales, provide the following information, totalled by physiographic province and Forest or BLM District;

a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.);

b. number and list of "no effect" sales and justification for this determination;

c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat, for both discretionary and non-discretionary sales; also indicate if the sale has been surveyed 0, 3, or 6 times, and whether the sale complies with the 50-11-40 rule

d. indicate in the lists above, those sales that are located fully or partially within HCAs, SOHAs, Areas of Concern, and/or ODFW/BLM agreement sites.

e. description of other activities that may be subject to future Section 7 consultation.

3. Description of the Affected Environment

- S Definition of spotted owl habitat and the amount in acres within each physiographic province, Forest and BLM District.
- S Biological data on listed species (historical use, presence, potential use); information and/or other documents containing such information may be incorporated by reference
- S Spotted owl information (from data bases, 1985 to Present) should include information on all owls, pairs and singles, and those unaffected by the timber sale programs.

4. Analysis of the Effects of the Action

- S General description
- S Direct and indirect effects such as habitat loss, dispersal habitat, number of owl pairs affected, etc. Indicate the amount of owl habitat (distinguish dispersal habitat when possible) proposed to be removed or altered (from partial harvest) in each physiographic province and Forest. This section should also include a summary analysis of effects on owl pairs from any or all of the following: sales within 0.5 mile of activity centers/nest sites; sales within 2.1/2.5 miles (home ranges); sales within 2.1/2.5 miles, where habitat would be reduced to below the minimum used by owl pairs in that province; and sales within Areas of Concern, as described in the Service's 1989 Status Review on the owl. It is important that this summary reflect the cumulative impacts to an owl pair from all sales affecting the pair.

- S Interrelated and interdependent actions such as roads, silviculture treatments, recreational projects, etc.
- S Cumulative impacts—future State and private actions, especially when these activities would affect owl pairs with home ranges overlapping federal and state or private lands.
- S Brief discussion of other listed species—provide an analysis of effects of the action to other listed species.

5. Alternatives Considered

- S Brief discussion of alternatives for sale, etc.
- S Describe conservation measures implemented to reduce or minimize impacts to spotted owls or habitat.
- S Prepare a contingency plan for situations where owl pairs are found in active timber sales.
- S Summary of program changes as a result of the above (for 318 package). Forest Service Region 5 will provide changes in the 1989-1990 sales program.

6. Conclusions (for the timber sale package submitted for formal consultation)

- S How will the action (package) affect each listed species:
  - a. no adverse affect;
  - b. may adversely affect; or
  - c. may beneficially affect?
- — Request consultation for those which may affect (adversely or beneficially).

Information Needs

To aid our analysis of impacts to owls in the biological opinions, and to complete our administrative record, the Service has requested that the agencies provide information, in a Table format, on owls and owl habitat.

- Number and list of owl pairs and singles (including those whose status is unconfirmed), by Forest or BLM District. This list should include those pairs whose home range or 2.1/2.5 miles radius circle overlaps adjacent state or private lands.
- For each owl pair affected by the program, provide the following information:

  a. pre-harvest acres of suitable habitat available to the pair within 0.5 miles and between 0.5 and 2.1/2.5 miles.

  b. acres of owl habitat removed within those distances, for each sale and for all sales (cumulative); and

  c. whether the pair is located in an area of concern, HCA, SOHA, or ODFW/BLM Agreement area.
- Database tables for individual timber sales brought forward for consultation.
- Short narratives from each Forest and BLM District to address selected parts of the above outline and summarize the biological evaluations for each sale.

The following provides a description of the general format that the Service follows when it provides a biological opinion to an action agency under Section 7 of the ESA.

APPENDIX 2: BIOLOGICAL OPINION FORMAT

Biological Opinion Format

1. Introduction
   a. Identify the issue and species in consultation
2. Biological Opinion
   a. Succinct statement (. . . is/is not likely to jeopardize, . . . will/will not adversely modify critical habitat) for each species.
3. Description of the Proposed Action
   a. Cite Public Notice, EIS, plan document, or rationale for packaging from biological assessment.
   b. Include interrelated, interdependent actions considered.
4. Species Account
   a. Status and biology of listed and proposed species.
5. Effects of the Proposed Action on Listed Species
   a. Cite past Opinions to same agency, recovery plans, Biological Assessments, etc., for species accounts.
   b. Include species information relevant to action area.
   c. Explain effects that are adverse or beneficial.
   d. If jeopardy, stress aspects that cause jeopardy.

e. Provide a basis for reasonable and prudent alternatives, and/or conservation recommendations.

6. Cumulative Effects

7. Reasonable and Prudent Alternatives

   a. If appropriate, but only for jeopardy findings.

8. Incidental Take

   a. Include sections in order.

      1. anticipated incidental take.

      2. reasonable and prudent measures to minimize incidental take.

      3. terms and conditions necessary to implement reasonable and prudent measures.

      4. instructions on disposition of dead animals.

   b. See Table 1 in this document

9. Conservation Recommendations

   a. See Appendices 3A and B in this document.

10. Closing

11. Literature Cited

APPENDIX 3A: Section 7 Consultation—Example Conservation Recommendations likely to be Recommended if the Interagency Scientific Committee Conservation Strategy Serves as the Basis for Consultation

The Service will provide conservation recommendations under Section 7(a)(1). These recommendations are not mandatory, but are intended to assist the agency in implementing actions that may result in the conservation of the owl.

1. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the total number of owls impacted and at what levels; and the total amount of owl habitat removed from the environmental baseline.

2. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

3. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

4. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long term, create or restore the necessary components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinate with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

    1. Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

g. Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

5. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

6. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

7. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

8. Consider reducing the annual allowable sale quantities to facilities implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

9. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 3B: Section 7 Consultation—General Conservation Recommendations Likely to be Recommended if the Interagency Scientific Committee Conservation Strategy does Not Serve as the Basis for Consultation

These recommendations are based upon the Service's knowledge of current management scenarios being pursued by the Forest Service (SOHA system) and Bureau of Land Management (ODFW agreement areas).

1. Eliminate or relocate the timber sales/units that are within 0.5-miles of a pair, and/or would reduce the amount of owl habitat to less than the minimum known to be used by owl pairs in each province.

2. Eliminate or relocate timber sales/units in areas of special concern (as identified in the Service's 1989 Status Review) unless an interagency plan for the conservation of dispersal habitat has been implemented.

3. Prioritize timber sales so that sales not impacting spotted owl pairs and/or spotted owl habitat are contracted first. Sales which have a minor impact should be contracted second, and sales that have a major impact should be offered last and only when absolutely necessary.

4. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the number and kinds of recommendations that are implemented; the total number of spotted owls impacted and to what degree; and the total amount of spotted owl habitat removed from the environmental baseline.

5. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

6. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

7. Management plans should be developed, in coordination with state and Federal wildlife agencies and the Forestry Sciences Labs, to provide for the long-term development and maintenance of nesting, foraging, and dispersal habitat necessary to maintain the northern spotted owl. Particular attention should be paid to avoiding impacts to spotted owls and restoring habitat within the identified areas of special concern.

8. Timber harvest activities should be minimized within relatively large, contiguous blocks of spotted owl habitat. Consider aggregating, instead of dispersing, these activities within the forest landscape, to avoid increasing fragmentation of remaining spotted owl habitat. Allow for changes in harvest prescription, from clearcut to commercial thinning or individual tree marking, to preserve necessary owl habitat components.

9. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long-term, create or restore the necessary habitat components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

    a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

    b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al.

(1988) for guidelines. Coordinate with fire and pest management specialists.

c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinated with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well- developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

- Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and
- Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

10. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

11. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide

increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

12. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

13. Consider reducing the annual allowable sale quantities to facilitate implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

14. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 4: Recovery Strategy

Approach 1: If the agencies implement the ISC conservation strategy as a management plan for the northern spotted owl, the Service can use this approach as an interim recovery plan while the strategy is being assessed through the recovery planning process for its applicability and acceptability as a formal recovery plan. Therefore, the Service recommends the following approach:

June/July 1990

- o The agencies indicate their acceptance and intentions towards implementation of the Conservation strategy.
- o The Service will convene a group of recognized experts (which may include members of the Scientific Committee and the Listing Review Team) to review the strategy in relation to the requirements and mandates of the Endangered Species Act and the feasibility of adopting the ISC plan for recovery planning purposes.

July 1990

- o A report will be provided to the Service on the applicability of the ISC Conservation Strategy as a recovery plan.
- o The Service will announce a decision to proceed with the recovery planning process using either the Conservation Strategy or another approach.
    - S If the Conservation Strategy is appropriate as a recovery plan, the Service will pursue its obligations to consider public input prior to finalization of the document as a recovery plan and to complete the planning processes.
    - S If the Service decides to pursue development of another recovery planning document, procedures described in Approach 2 would be followed.

January 1991

- o Finalize and approve recovery plan (if the ISC strategy is the recommended approach).

Approach 2: If the Service follows a normal process for developing a recovery plan, it is recommended that a "classic" scientific recovery team be established for the owl. Through the ISC team effort and the Listing Review Team there are a number of highly qualified persons identified as good candidates to serve on the Team. As a mechanism for the science of recovery to interface with land management concerns, the Team Leader should participate in the Interagency Northern Spotted Owl Conservation Group (formally ISOC) meetings. The ISC report provides a good starting point for a recovery plan; the Service will need to look closely at this document in establishing recovery goals and objectives.

July 1990

- o Send out letters to agencies, universities, etc. requesting nominations to recovery team. Expertise will be sought in the following areas:
  1. northern spotted owl ecology,
  2. conservation biology,
  3. population genetics,
  4. population ecology,
  5. biogeographical modeling with expertise in geographic information systems; and
  6. old growth forest management.

August 1990

- o Select recovery team, and schedule first team meeting.

September 1991

- o Complete draft recovery plan for public review and comment.

March 1992

- o Finalize and approve a recovery plan.

April 1992 and Beyond

- o Implement the recovery plan. This could be done using an implementation team approach. Representatives would include those from: Forest Service, Bureau of Land Management, State wildlife agencies, State forestry departments, timber industry, and environmental groups.
- o A management oversight group and technical group could be formed to advise the Service (oversee) research and management actions affecting recovery of the northern spotted owl.

APPENDIX 5: 1990 Interagency Agreement (attached)

MEMORANDUM OF AGREEMENT

AMONG

STATE OF CALIFORNIA
THE RESOURCES AGENCY

STATE OF WASHINGTON
DEPARTMENT OF WILDLIFE,

STATE OF OREGON
DEPARTMENT OF FISH AND WILDLIFE,

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE,
BUREAU OF LAND MANAGEMENT,
NATIONAL PARK SERVICE,

AND

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

TO ESTABLISH AN INTERAGENCY
NORTHERN SPOTTED OWL CONSERVATION
GROUP

This Memorandum of Agreement ("Memorandum") is entered into this 13th day of April, 1990, among the State of California Resources Agency, the Oregon Department of Fish and Wildlife, the Washington Department of Wildlife, the U.S. Fish and Wildlife Service, the USDA Forest Service, the Bureau of Land Management, and the National Park Service (collectively called the "Public Agencies").

WHEREAS, all parties to this Memorandum of Agreement recognize that they each have responsibilities under their statutory authorities that cannot be delegated and that this Memorandum cannot and is not intended to abrogate any of their independent decision-making responsibilities, and

WHEREAS, the Public Agencies are among the Federal and State agencies that have regulatory authority or responsibility under certain Federal and State statutes to manage for the northern spotted owl (*Strix occidentalis caurina*) and its habitat, and

WHEREAS, the multiple sources of authority under which the Public Agencies operate do not provide any individual agency with the authority to implement a comprehensive program to provide for the long-term conservation of the northern spotted owl across its historic range, and

WHEREAS, the Federal Agencies have entered into an interagency agreement to cooperate in ensuring the conservation of the spotted owl, and

WHEREAS, the Public Agencies desire that their activities, to fulfill their respective responsibilities with regard to the conservation of the northern subspecies of the spotted owl, be coordinated in such a manner as to ensure effective, timely, and mutually beneficial use of financial and personnel resources, and

WHEREAS, the Public Agencies share the common goal of ensuring the conservation for the northern spotted owl,

THEREFORE, it is mutually agreed and understood that:

PURPOSE OF MEMORANDUM

The Public Agencies have entered into this Memorandum to establish an Interagency Northern Spotted Owl Conservation Group to develop and ensure compliance with cooperative programs related to the conservation of the northern spotted owl.

INTERAGENCY NORTHERN SPOTTED OWL CONSERVATION GROUP

Secretary, State of California, The Resources Agency

Director, State of Washington, Department of Wildlife

Regional Director, U.S. Fish and Wildlife Service, Portland, Oregon

Regional Forester, U.S. Forest Service, Portland, Oregon

Director, Pacific Northwest Experiment Station, Portland, Oregon

Regional Forester, U.S. Forest Service, San Francisco, California

State Director, U.S. Bureau of Land Management, Portland, Oregon

State Director, U.S. Bureau of Land Management, Sacramento, California

Regional Director, National Park Service, San Francisco, California

Regional Director, National Park Service, Seattle, Washington

Director, State of Oregon, Department of Fish and Wildlife

OPERATION

1. The Regional Director of the U.S. Fish and Wildlife Service shall chair the Interagency Northern Spotted Owl Conservation Group (Interagency Group) for a period of 2 years from the date of execution of this agreement. Chairperson of the Interagency Group shall rotate on an annual basis among the participating agencies. Future chairpersons will be chosen by the Interagency Group.

2. The Interagency Group will meet as frequently as agreed upon by a majority of the voting members. Meetings shall be called by the Chairperson.

3. The Interagency Group may establish, or rely on, existing coordinating or working groups, as necessary or appropriate, to address specific issues relative to northern spotted owl conservation.

RESPONSIBILITIES

1. Identify, consider, and recommend, as appropriate, management and research activities for the conservation of the northern spotted owl.

2. Direct activities of any coordinating or working groups established by the Interagency Group.

3. Exchange information, coordinate, and provide standards and guidelines for needed management, monitoring, and research activities related to the conservation of the northern spotted owl.

4. Serve as a discussion forum for and liaison with all interest groups to serve as a common source of information and to address identified problems or conflicts.

TERM AND AMENDMENTS

This agreement is subject to all applicable laws and regulations. This Agreement may be amended upon the written consent of all parties. Parties to this Agreement may withdraw from this Agreement at any time upon written notice to the Interagency Group chair.

All signatories to this Memorandum agree to seek mutually agreeable solutions to achieve its purposes.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum, on the date(s) set forth, as of the day and year last written.

Memorandum of Agreement to Establish an Interagency

Northern Spotted Owl Conservation Group

By /s/ unreadable Date April 13, 1990
Director, State of Oregon
Department of Fish and Wildlife
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Director, State of Washington
Department of Wildlife
Olympia, Washington

By /s/ David M. Jay Date 4-13-90
for Regional Forester
U.S. Forest Service
San Francisco, California

By /s/ unreadable Date 4-13-90
Regional Forester
U.S. Forest Service
Portland, Oregon

By /s/ unreadable Date 4/13/90
Director
Pacific Northwest Experiment Station
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Regional Director
U.S. Fish and Wildlife Service
Portland, Oregon

By /s/ unreadable Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Sacramento, California

By /s/ Elaine Y. Zelinski Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Portland, Oregon

By /s/ unreadable _____ Date April 19, 1990
for Regional Director
National Park Service
San Francisco, California

By /s/ unreadable _____ Date April 13, 1990
Acting Regional Director
National Park Service
Seattle, Washington

By /s/ unreadable _____ Date April 19, 1990
Secretary, State of California
The Resources Agency
Sacramento, California

APPENDIX Q

BEFORE THE BOARD OF FORESTRY
OF THE STATE OF OREGON

In the Matter of Boise	) DOJ Case No.
Cascade's Walker Creek	) 629-430-NR002-92
Timber Harvest Operation	) Hearings Case No.
Plan	) 92-DOF-007

FINAL ORDER

Statement of the Case: On February 4, 1992, Boise Cascade Corporation, referred to as "Boise Cascade" hereinafter, submitted a written plan concerning a proposed harvesting operation in the Walker Creek area of Clatsop County. The plan was denied. On May 5, 1992, Boise Cascade submitted an amended written plan. The amended written plan was denied on May 15, 1992. Boise Cascade requested a hearing on June 12, 1992. A hearing was held in Salem, Oregon on October 20, 1992. Melinda L. Bruce and Jerome S. Lidz, Assistant Attorneys General, represented the Department of Forestry ("ODF"). Attorney Phillip D. Chadsey of Stoel Rives Boley Jones & Grey represented Boise Cascade. Charles Stone, Richard Skipper, Clint Smith and William A. Dryden appeared as witnesses. The Department of Forestry filed a post-hearing memorandum on November 4, 1992. Boise Cascade filed a reply memorandum on November 13, 1992.

A Proposed Order was served on the parties on December 17, 1992. Attorney Chadsey filed exceptions on behalf of Boise Cascade. The Oregon State Board of Forestry met in regular session on January 6, 1993, at the State Forester's Headquarters in Salem, Oregon. Melinda Bruce and Phillip Chadsey presented argument to the Board. After considering the record, the Board did approve and adopt the Hearing Officer's Proposed Order.

Legal Issue: Should the amended written plan for the proposed Walker Creek timer harvest operation be approved under the Forest Practices Act and OAR 629-24-809?

Hearing Officer's Findings of Fact: (1) Boise Cascade is a publicly held forest products company which owns and operates sawmills, plywood plants, and pulp and paper mills in Oregon. It also owns and manages commercial timberlands for the purpose of supplying wood to those facilities. (2) In October 1988, in a trade of commercial timberlands with Longview Fiber Corporation, Boise Cascade acquired some commercial timberlands in Clatsop County. (3) Boise Cascade subsequently harvested some timber from the lands and in October 1991 arranged a sale of all its Clatsop County lands to another company, Hampton. (4) A 64 acre parcel located in the SW 1/4, Section 6, Township 6 N., Range 6 N., was excluded from the sale. That parcel is referred to as the Walker Creek Unit hereinafter. (5) That property is presently and at all pertinent times has been zoned as commercial timberlands. (6) In 1988 the Oregon Department of Fish and Wildlife ("ODFW") declared the spotted owl to be a threatened species, although no protective measures were adopted at that time. (6A) As early as 1986, a male spotted owl had been observed on the Walker Creek Unit. In 1990, a pair of spotted owls nested and successfully hatched two young owls on the property. (7) In 1991, a Boise Cascade survey identified a singe female in the area. No nesting activity was observed.

(8) On January 7, 1992, Boise Cascade filed Notification Number 92-521-11022 giving notice to the State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. (8) Because of the location of protected waters on or near the unit and the unit's identification as spotted owl habitat, a written plan was required. (9) Boise Cascade filed the written plan on February 4, 1992. (10) The plan provided that, if a pair of owls nested in the operations

area, no operations would be conducted during the critical period of use, March 1 to September 30, or until the young owls fledged. (11) The written plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70 acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

(12) On May 5, 1992, Boise Cascade submitted an amended written plan. (13) The plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was different from the nest site observed in 1990. (14) The plan provided that Boise Cascade would not conduct operations in the area while the owls were present. (15) With respect to habitat, the plan stated that there were more than 70 acres of commercial timberland immediately adjacent to Boise Cascade's property and owned by the State of Oregon which could provide habitat for the owls after the Boise Cascade property had been logged. None of these properties encompassed the nest site. (16) On May 15, 1992, approval of the amended written plan was denied on the stated ground that the plan filed to identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. (17) Forest Practices Forrester ("FPF") Richard E. Skipper's letter of denial made reference to a recent field inspection conducted by himself, Clint Smith, a wildlife and fisheries specialist with ODF, and Bosie Cascade's agent, during which 70 acres of suitable habitat was identified and which included 47 acres of Boise Cascade's Walker Creek Unit and 23 nearby acres on lands owned by a private owner and by the state. (18) The letter advised Boise Cascade that there were eight acres in the unit outside the designated suitable habitat that could be harvested or that the entire unit could be harvested if an incidental take permit was approved by the United States Fish and Wildlife Service ("USFWS").

(19) In August 1990, the Oregon State Forester adopted an interim administrative policy precluding timber harvest within a 70-acre core area of the best available spotted owl habitat around known nest sites or activity centers. (20) The 70-acre core area requirement was based on a similar requirement in the USFWS guidelines adopted after that agency on June 23, 1990 declared the spotted owl a "threatened species" under the federal Endangered Species Act. (21) The Oregon State Board of Forestry subsequently adopted OAR 629-24-809, which requires protection of a 70-acre core area of suitable habitat encompassing the nest site.

(22) Following a public hearing on February 28, 1991, on March 29, 1991, a hearing officer filed with the State Forester a document entitled "Report of Hearing Officer, Summary of Testimony, Findings and Conclusions," which was concerned with the Board of Forestry's proposed Forest Practice Rule for protection of Northern Spotted Owl nest sites when conducting forest operations on state and private lands. (23) In October 1991, the USFWS rescinded its guidelines pertaining to spotted owls on privately owned lands. (24) On January 6, 1992, Melinda L. Bruce, Assistant Attorney General of the Natural Resources Section, sent a letter to Ted Lorensen, Unit Manager for Technical Support (Monitoring and Policy) for the ODF, advising him that the recision of the federal guidelines concerning the northern spotted owl had no effect on the validity of OAR 629-24-809.

(25) On June 3, 1992, Boise Cascade's representative, Bill Dryden, sent FPF Skipper a letter. (26) On June 16, 1992, Jerome Lidz, Assistant Attorney General, sent a letter to Dale Hall of USFWS, in which he stated that ODF did not purport to be acting under the authority of the federal Endangered Species Act in enforcing its Forest Practices rules. The letter further stated that a decision by the USFWS that no incidental take permit was required under federal law

would not satisfy the Oregon administrative rule which allowed the issuance of such a permit by the USFWS as an alternative means of complying with state law. (27) On July 29, 1992, Assistant Attorney General Lidz sent a letter to Phillip Chadsey, counsel for Boise Cascade. (28) Subsequent to denying Boise Cascade's plan to log the Walker Creek Unit, the State of Oregon has advertised for sale commercial timber on land that it owns in Clatsop County approximately one and a half miles from the Walker Creek Unit. The timber, which is to be clear cut, consists mostly of hardwoods that are not suitable owl habitat. (29) Adult spotted owls may live in a habitat that encompasses an area that has a radius of more than one and a half miles.

Conclusion and Reasons: The written plan was properly denied under the Forest Practices Rules. The plan fails to comply with the requirements of OAR 629-24-809.

OAR 629-24-809 provides as follows:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl . . . , the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> > (a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
> >
> > (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.
>
> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl

nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3) (a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80 percent); multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) in this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection (1) of this rule is not in lieu of any federal requirements related to the federal Endangered Species Act.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by

> the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

OAR 629-24-695 states that the goal of resource site protection is "to ensure that forest practices do not lead to resource site destruction, abandonment or reduced productivity." For spotted owls, the resource site is the nesting site. (OAR 629-24-800).

Boise Cascade's written plan was rejected because it did not identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. The plan did not specifically identify any suitable spotted owl habitat, as defined in OAR 629-24-809(3); it simply stated that there was more than 70 acres of state-owned "commercial timberland immediately adjacent to the harvest area" which could provide habitat for the spotted owls after the Boise Cascade land had been logged. The nest site located on Boise Cascade's land was necessarily excluded from that habitat. At hearing Boise Cascade did not attempt to present evidence that it intended in the written plan to protect the nest site; in fact it acknowledged its intention in the planned operation to destroy the nest tree after the critical nesting period. Under the rule, the written plan could not be approved as submitted.

The Board of Forestry did not exceed its authority in adopting OAR 629-24-809.

In ORS 527.630 the legislature stated the policy of the Forest Practices Act as follows:

> (1) Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and acquatic life. Therefore, it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvest of forest tree

> species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish and wildlife resources and scenic resources within visually sensitive corridors as provided in ORS 527.755 that assures the continuous benefits of those resources for future generations of Oregonians.

In ORS 527.710 the legislature mandated that the Board of Forestry adopt administrative rules to carry out the purposes of the Forest Practices Act, to assure the continuous growing and harvesting of forest tree species and, consistent with ORS 527.630, to provide for the overall maintenance of air quality, water resources, soil productivity and fish and wildlife.

In addition to those specified rulemaking duties, the statute required the Board to collect and analyze the best available information and establish inventories of resource sites needing protection, including threatened and endangered species identified on lists that are adopted, by rule, by the State Fish and Wildlife Commission or are federally listed under the federal Endangered Species Act. Recognizing the potential conflicts between forest practices and resource sites, the Board was required to analyze such conflicts and adopt rules appropriate to protect such resource sites. The statute further required the Board to consult with other state agencies having functions with respect to the purposes specified in ORS 527.630 and to accommodate their rules and programs to the extent deemed by the Board to be appropriate and consistent with the purposes of ORS 527.630.

The Board's authority to enact OAR 629-24-809 is clear under the above statutes. Boise Cascade's argument that rules enacted under these statutes are invalid if they prevent or impede the growing or harvesting of any trees at any time on private lands is simply not rational. The statute explicitly recognizes inevitable conflict between forest practices, which

include by statutory definition the harvesting of forest tree species, and resource site protection. The Board was required to adopt rules for resource site protection.

Neither does the rule exceed in scope the authority delegated to the Board of Forestry. The identified resource sites would not be protected from destruction, abandonment or reduced productivity if the site were maintained only during the period of critical use. The site is protected so that it might shelter and promote the continued existence of the threatened species; it is not, as Boise Cascade would have it, that a particular specimen of a threatened species is protected so that it can create a new resource site. The ODF's interpretation of its statutory mandate is consistent with the plain language of that mandate. The interpretation proposed by Boise Cascade is contrary to that plain language.

The evidence also establishes that in adopting OAR 629-24-809 the Board used what it believed to be the best scientific evidence available. Nothing in the statutory mandate excluded from consideration information gathered for purposes of enforcing the federal Endangered Species Act.

Finally, there is nothing substantial in the record to support Boise Cascade's arguments that the Board of Forestry improperly delegated authority to the USFWS; that the Board shifted enforcement of the state's endangered species protection laws to the federal government; or that the Board shifted the burden of northern spotted owl protection from state lands to private lands.

OAR 629-24-809 is not invalid under the Oregon and United States constitutions. Both Article I, Section 18, of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the state from taking private land for a public use without just compensation to the landowner. Boise Cascade argues that the referenced rule is invalid under those constitutional provisions and cites

as authority the recent U.S. Supreme Court decision, *Lucas v. South Carolina Coastal Commission*, 505 US ___,112 S Ct 2886, 120 L Ed 2d 798 (1992).

Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts in its Reply Memorandum that such an argument is not premature, it did not at hearing attempt to present evidence that any "taking" had in fact occurred. It was established that spotted owls had been observed on the property prior, to its purchase by Boise Cascade and that the ODFW had declared the spotted owl to be a threatened species in the year of purchase. There was also evidence that the 64 subject acres were part of a much larger tract of forestland, some of it contiguous to the Walker Creek Unit, and that Boise Cascade harvested timber from some of that acreage before late 1991 , when it sold off all its Clatsop County lands except the subject unit. The value of the harvested timber and the consideration received in the sale of adjoining acreage to Hampton were not established and Boise Cascade objected to any questions directed to establishing such facts. Boise Cascade's reasonable commercial expectations might well have been realized or surpassed. Certainly there is an inadequate factual basis upon which to advance any claim of a constitutional taking.

FINAL ORDER

Approval of the amended written plan submitted by Boise Cascade for its proposed Walker Creek Unit timber harvest operation, Notification Number 92-521-11022, was properly denied under the Oregon Forest Practices Act and OAR 629-24-101 et seq.

/s/ James E. Brown

JAMES E. BROWN
STATE FORESTER and
SECRETARY to the
BOARD OF FORESTRY

Dated this 15th day of January, 1993.

You are entitled to judicial review of the Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the Provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the *Office of State Court Administrator, Supreme Court Building, Salem, Oregon, 97310*, within 60 days from a service of the Final Order.

APPENDIX R

PROPOSED RULES
DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service

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50 CFR Part 17

RIN 1018-AD20

Endangered and Threatened Wildlife and Plants; Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands

Friday, February 17, 1995

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed Special Rule.

SUMMARY: The implementing regulations for threatened wildlife generally incorporate the prohibitions of Section 9 of the Endangered Species Act (Act) of 1973, as amended, for endangered wildlife, except when a "special rule" promulgated pursuant to Section 4(d) of the Act has been issued with respect to a particular threatened species. At the time the northern spotted owl, Strix occidentalis caurina, (spotted owl) was listed as a threatened species in 1990, the Fish and Wildlife Service (Service) did not promulgate a special section 4(d) rule and, therefore, all of the section 9 prohibitions, including the "take" prohibitions, became applicable to the species. Subsequent to the listing of the spotted owl, a Federal Late-Successional and Old-growth (LSOG) forest management strategy (Plan) was developed and then formally adopted on April 13, 1994, in a Record of Decision (ROD) that amended land management plans for Federal forests in northern California, Oregon, and Washington. Although this proposed rule refers to the Federal LSOG forest strategy as the "Forest Plan", it is noted that the strategy is

not a stand-alone management Plan but rather effected a series of amendments to Forest Service and the Bureau of Land Management planning documents. In recognition of the significant contribution the Plan does make toward spotted owl conservation and management, *the Service now proposes a special rule, pursuant to section 4(d) of the Act, to replace the blanket prohibition against incidental take of spotted owls* with a narrower, more tailor-made set of standards that reduce prohibitions applicable to timber harvest and related activities on specified non-Federal forest lands in Washington and California.

DATES: Comments from all interested parties must be received by May 18, 1995.

The service seeks comments from the interested public, agencies, and interest groups on this proposed special rule and the potential environmental effects of its implementation. A Draft Environmental Impact Statement (DEIS) is being developed to accompany this proposed rule and will be published soon after the proposed rule. The end of the comment period on this proposed rule will be extended to coincide with the end of the public comment period on the DEIS.

ADDRESSES: Comments and materials concerning this proposed rule should be sent to Mr. Michael J. Spear, Regional Director, Region 1, U.S. Fish and Wildlife Service, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181. The complete file for this proposed rule will be available for public inspection, by appointment during normal business hours, at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Curt Smitch, Assistant Regional Director, North Pacific Coast Ecosystem, 3704 Griffin Lane SE, Suite 102, Olympia, Washington 98501 (206/534-9330); or Mr. Gerry Jackson, Deputy Assistant Regional Director, North Pacific Coast

Ecosystem, 911 N.E. 11th Avenue, Portland Oregon 97232-4181, (503/231-6159).

SUPPLEMENTARY INFORMATION:

Abstract

The implementing regulations for threatened wildlife generally incorporate the prohibitions of section 9 of the Endangered Species Act (Act) of 1973, as amended, for endangered wildlife, except when a "special rule" promulgated pursuant to Section 4(d) of the Act has been issued with respect to a particular threatened species. When the northern spotted owl, Strix occidentalis caurina, (spotted owl) was listed as a threatened species in 1990, the Fish and Wildlife Service (Service) did not promulgate a special 4(d) rule. Therefore, all of the Section 9 prohibitions for endangered species were made applicable to the spotted owl throughout its range, including the prohibitions against "take" that apply to endangered species under the Act.

Subsequent to the listing of the spotted owl, a new Federal forest management strategy was developed and proposed by the Forest Ecosystem Management Assessment Team (FEMAT), which was established by President Clinton following the April 2, 1993, Forest Conference in Portland, Oregon. FEMAT was established to develop options for the management of Federal LSOG-forest ecosystems in northern California, Oregon, and Washington within the range of the spotted owl. FEMAT outlined those options in the report, Forest Ecosystem Management: An Ecological, Economic, and Social Assessment, which drew heavily upon previous scientific studies conducted on the northern spotted owl. On July 1, 1993, the President identified "Option 9" in the FEMAT Report as the preferred alternative for managing Federal LSOG-forests in northern California, Oregon, and Washington. The proposed management scenario under Option 9 of FEMAT established a system of late-successional

forest and riparian reserves that would, in conjunction with Administratively withdrawn and Congressionally reserved areas, provide the foundation of protected "old growth" habitat that would benefit spotted owls, marbled murrelets, salmon and many other old growth associated species; adaptive management areas (AMAs) and surrounding "matrix" lands would constitute the remaining forest management designations on Federal lands in the planning area. Future timber harvesting activities on Federal lands within the range of the northern spotted owl were expected to occur primarily in AMAs and Federal lands determined to constitute the "matrix."

A draft Supplemental Environmental Impact Statement was issued in July 1993 to assess the environmental impacts of the alternatives which were set forth in the FEMAT Report. A final SEIS was completed in February 1994, and a Record of Decision was signed on April 13, 1994. This process culminated in the formal administrative adoption of Alternative 9 (a revised version of option 9 as it had been presented in the FEMAT Report), which has now become known, simply, as the Forest Plan or Plan. This Plan provides a firm foundation for the conservation needs of the spotted owl, especially in light of the net addition of approximately 600,000 acres of Federal forest lands to protected reserve status between its original formulation in the FEMAT Report and the Record of Decision. On December 21, 1994, Federal District Court Judge William L. Dwyer, issued his order upholding the adequacy of the Plan. Judge Dwyer said "The order now entered,* * *, will mark the first time in several years that the owlhabitat forests will be managed by the responsible agencies under a plan found lawful by the courts. It will also mark the first time that the Forest Service and BLM have worked together to preserve ecosystems common to their jurisdictions."

Despite enhanced owl protection under the final Forest Plan, however, the Service believes that some supplemental support from non-Federal forest lands remains necessary and advisable for owl conservation in certain parts of the range of the owl.

Based upon the possibility that the preferred alternative of FEMAT (Option 9) would eventually be adopted, the Service published a Notice of Intent (NOV in the Federal Register (58 FR 69132) on December 29, 1993, and sent out a mailer advising the public of its intention to prepare an Environmental Impact Statement (EIS) for a proposed special rule that would ease restrictions for the spotted owl on certain non-Federal forest lands. In response, the Service received and evaluated more than 8,500 public comments. Taking these comments into consideration, and based upon additional analyses, the Service now proposes a special rule that would reduce the prohibition against incidental take of spotted owls in the course of timber harvest and related activities on specified non-Federal forest lands in Washington and California.

For reasons discussed in more detail later, the Service is not including Oregon, at this time, within the geographic scope of this proposed special rule. The Service is aware of ongoing efforts within Oregon between the Governor's office and large and small landowners to fashion an "Oregon Alternative" to the Service's proposed action for the State, as set out in the December 29, 1993, NOI. The Service is supportive of this effort and will maintain the regulatory status quo for spotted owls in Oregon in anticipation that an "Oregon Alternative" approach to owl conservation will be developed. Thus, by excluding Oregon altogether from this proposed special rule, the Service retrains for Oregon the original level of protection against take for the owl established when the species was listed on June 26, 1990.

In assessing the conservation needs of the northern spotted owl on non-Federal lands, the Service was particularly

mindful of—(1) The level of protection to be provided the owl under the Federal reserve and riparian buffer systems established under the Forest Plan, as well as the matrix and adaptive management area prescriptions under the Plan; (2) the range, location, and number of spotted owls on non-Federal and Federal lands; (3) recently developed State programs to regulate forest practices to benefit the spotted owl; and (4) emerging non-Federal landowner habitat management and owl conservation strategies such as Habitat Conservation Plans and agreements to avoid the incidental take of owls.

This special rule proposes to replace the currently applicable blanket prohibition against incidental take on non-Federal lands throughout the owls' range with a more particularized set of prohibitions for Washington and California. For the State of Washington, incidental take restrictions would be relaxed for approximately 5.24 million acres of non-Federal land in conifer forests. While only a considerably smaller acreage figure of non-Federal forest land is presently affected by incidental take prohibitions for the spotted owl, the fear of future owl restrictions is a significant concern of forest landowners throughout the range of the spotted owl. This proposed rule would ease incidental take restrictions on designated non-Federal lands by limiting the incidental take prohibition for timber harvest activities to actions that fail to maintain the 70 acres of suitable owl habitat closest to a site center for a spotted owl. By proposing this action, the Service is not implying that incidental take cannot occur until harvest activities approach and actually invade an owl's activity center. Rather, the Service is proposing that, in certain portions of the owl's range, the incidental take of an owl will no longer be a prohibited activity unless it involves harvest activities within an activity center.

Current incidental take restrictions would be retained for those spotted owls whose site centers are located within six designated zones or "Special Emphasis Areas" (SEAs) in the State of Washington. The six SEAs include the western portion of the Olympic Peninsula, the Finney Block area, the I-90 Corridor, the Mineral Block area, the Siouxon Creek area and the Columbia Gorge/White Salmon areas. These areas were generally chosen to fill in gaps in protection under the Forest Plan where the Federal land base alone appears currently to be inadequate to provide for the conservation of the owl.

In addition, the Service proposes to implement a "Local Option Conservation Planning" program in Washington to provide an opportunity for additional relief from incidental take prohibitions for non-Federal landowners who own between 80 and 5,000 acres of forest lands within an SEA. The Local Option process is envisioned to be the equivalent of a "short form" Habitat Conservation Plan. The local option conservation planning process would not apply to those areas where the Service determines that suitable owl habitat (nesting, roosting or foraging habitat) on non-Federal lands within SEAs can reasonably be expected to provide important demographic support for Federal owl reserves. These "Local Option" conservation plans would provide non-Federal landowners with the flexibility to develop alternative prescriptions or restrictions for their lands which could achieve a level of protection comparable to the conservation objectives set forth for the owl in this rule.

For the State of California, this proposed rule would recognize the significant conservation benefits accorded the northern spotted owl under California law by easing the Federal prohibition against incidental take from timber harvest activities in most of the Klamath province of that State. The zone in which this would occur would be called the Klamath Province Relief Area. The incidental take

prohibition for timber harvests in this Relief Area would be limited to actions which fail to maintain the 70 acres of suitable owl habitat closest to a site center for a spotted owl. Additional relief could be provided to non-Federal landowners in four potential "California Conservation Planning Areas" (CCPAs) referred to as the California Coastal Area, Hardwood Region, Wells Mountain-Bully Choop area, and the California Cascades pursuant to the planning process under the California Natural Communities Conservation Planning (NCCP) Act or through completion of a Habitat Conservation Plan (HCP) under Section 10(a)(1)(B) of the Act (Figure 1 to s17.41(c)).

Except for acreage actually located within owl activity centers, the Service also proposes that small landowners who own no more than 80 acres of forest lands within a given SEA in Washington or one of the four potential CCPAs in California, as of the publication date of this proposed rule in the Federal Register, would be relieved of the general prohibition against incidental take. The only exception to this proposal would be for any small landowner who owns any or all of the 70 acres of forested lands closest to an owl site center. The incidental take restriction would continue to apply within such 70 acres.

The Service also proposes to provide landowners within SEAs in Washington or potential CCPAs in California additional flexibility for avoiding incidental take liability if their lands are intermingled with Federal matrix or Adaptive Management Area (AMA) lands. In such situations, non-Federal landowners would be provided the alternative option at their choosing of adopting the final harvest prescriptions delineated for the surrounding Federal matrix or AMA lands, in lieu of management practices which comply with current incidental take restrictions. The one exception to this policy would be where the adoption of final matrix or AMA harvest prescriptions could result in the incidental take of an owl

whose site center is located within a Forest Plan reserve or Congressionally reserved or Administratively withdrawn areas. In such a case, the incidental take restrictions would continue to apply for at least two more years, pending review of the status of owls in affected reserve or withdrawn areas.

For Tribal forest lands in Washington and California, the Service proposes to lift the Federal prohibition against the incidental take of the spotted owl except for harvest activities within the immediate 70 acres around a site center. Timber harvests conducted in accordance with Tribal resource regulations would not be subjected to any additional Federal prohibitions against incidental take of the owl.

Additionally, the Service proposes to include a "sunset" provision that would lift the incidental take restrictions within an SEA or CCPA once the owl conservation goals for that area are achieved. The Service also proposes to provide a "safe harbor" of certainty for harvest activities within SEAs or CCPAs where more than 40 percent suitable owl habitat would be retained after harvest within an owl's median annual home range. In those instances where the "safe harbor" provision would apply, landowners would not be subject to a take prohibition violation under any circumstances should an incidental take of an owl nevertheless occur despite the landowner's efforts to avoid take. The "safe harbor" provision would not apply, however, to any timber harvest activities within the closest 70 acres of suitable owl habitat surrounding an owl site center regardless of the percentage of suitable owl habitat left within an owl's median annual home range in addition, the proposal sets out a new approach to provide incentives to non-Federal landowners to restore or enhance degraded spotted owl habitat, or to maintain existing suitable owl habitat, without being penalized if their conservation efforts subsequently attract spotted owls.

Definitions

As used in this proposed rule:

"Activity center" means the closest 70 acres of suitable habitat around the nest tree of a pair of owls or around the primary roost of a non-nesting pair or territorial single owl (see "site center").

"Adaptive management area" means the ten landscape units that were adopted in the April 13, 1994, Record of Decision for development and testing of technical and social approaches to achieving specific ecological, economic, and other social objectives.

"Administratively withdrawn area" means lands that are excluded from planned or programmed timber harvest under current agency planning documents or the preferred alternative for draft agency planning documents.

"California Conservation Planning Area (CCPA)" means areas in which the State of California Resources Agency could conduct planning for spotted owls under the auspices of the California Natural Communities Conservation Planning Act (CNCCPA) of 1991.

"Congressionally reserved area" means those lands with Congressional designations that preclude timber harvest, as well as other Federal lands not administered by the Forest Service or Bureau of Land Management, including National Parks and Monuments, Wild and Scenic Rivers, National Wildlife Refuges, and military reservations.

"Conservation" as defined in the Endangered Species Act generally means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.

"Demographic support" refers to the effects on a population from a combination of births and deaths such that the net result is a stable or increasing population. For the spotted owl this would occur through provision and maintenance of: (1) Both suitable and dispersal habitat to support individual owls; (2) small clusters or larger groups of successfully breeding owls; and (3) the successful interaction and movement between individuals and pairs.

"Dispersal" refers to movements through all habitat types by: (1) juvenile spotted owls from the time they leave their natal area until they establish their own territory; (2) non-territorial single spotted owls; or (3) displaced adults searching for new territories.

"Dispersal habitat" means forest stands with adequate tree size, structure, and canopy closure to provide--(1) cover for dispersing owls from avian predators; and (2) foraging opportunities during dispersal events.

"Federal reserve" or "Forest Plan reserve" means those Federal lands delineated in the April 13, 1994, Record of Decision in which programmed timber harvest is not allowed and is otherwise severely limited. There are two types of reserves—late-successional reserves, which are designed to produce contiguous blocks of older forest stands, and riparian reserves, which consist of protected strips along the banks of rivers, streams, lakes, and wetlands which act as a buffer between these water bodies and areas where timber harvesting is allowed.

"Habitat Conservation Plan" (HCP) means an agreement between the U.S. Fish and Wildlife Service and either a private entity, local or county government or state under section 10(a)(1)(B) of the Act that specifies conservation measures that would be implemented in

exchange for a permit that would allow the incidental take of a listed species.

"Home range" means the area a spotted owl uses and traverses in the course of normal activities in fulfilling its biological needs during the course of its life span.

"Incidental Take" means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

"Matrix" means those Federal lands generally available for programmed timber harvest which are outside of the Congressionally reserved and Administratively withdrawn areas, Federal reserves and adaptive management areas as delineated in the Standards and Guidelines adopted in the April 13, 1994, Record of Decision.

"Province" or "Physiographic Province" means one of twelve geographic areas throughout the range of the northern spotted owl which have similar sets of biological and physical characteristics and processes due to effects of climate and geology which result in common patterns of soils and broad-scale vegetative communities.

"Record of Decision" means the April 13, 1994, Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (USDA/USDI 1994).

"Site Center" means the actual nest tree of a pair of spotted owls or the primary roost of a non-nesting pair or territorial single owl.

"Special Emphasis Area (SEA)" means one of six specific areas in the State of Washington where the Service has determined that it would be necessary and advisable to continue to apply broad protection from incidental take to support conservation efforts for the spotted owl.

"Suitable Habitat" means those areas with the vegetative structure and composition that generally have been found to support successful nesting, roosting, and foraging activities of a territorial single or breeding pair of spotted owls. Suitable habitat is sometimes referred to as nesting, roosting, and foraging (NRF) habitat.

"Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct with respect to a spotted owl.

"Threatened Species" means a plant or wildlife species defined through the Endangered Species Act that is likely to become within the foreseeable future an endangered species throughout all or a significant portion of its range.

"Timber harvest and related activity" means any activity that would result in the removal or degradation of suitable habitat.

Background

Regulatory History of the Northern Spotted Owl

The Service listed the northern spotted owl as a threatened species on June 26, 1990, because of the past and continued projected loss of suitable habitat throughout its range (55 FR 26114). This habitat loss has been caused primarily by timber harvesting, but has been exacerbated by the effects of catastrophic events such as fire, volcanic eruption, and wind storms.

The inadequacy of regulatory mechanisms existing in 1990 under State and Federal law also contributed to the decision to list the northern spotted owl as a threatened species. During the period immediately prior to listing, when the status of the owl was under review, the annual Federal timber harvest in Oregon and Washington averaged approximately 5 billion board feet per year. Much of that harvest comprised suitable spotted owl habitat. Thus, Federal timber harvest policies at that time contributed significantly to the decline of the owl.

State protection for the owl in 1990 was also inadequate. Since that time, California, Oregon and Washington have all recognized the plight of the owl and have adopted forest management rules designed to protect this threatened species. The degree of protection accorded the northern spotted owl currently varies under State law. The northern spotted owl is listed under Washington law as an endangered species, under Oregon law as threatened, and under California law as a sensitive species.

On January 15, 1992, the Service designated critical habitat for the northern spotted owl (57 FR 1796). The critical habitat designation encompassed 6.9 million acres of Federal land in 190 critical habitat units in the States of California, Oregon, and Washington; non-Federal lands were not included in the critical habitat designation. Of the total acreage that was designated, 20 percent is in California, 47 percent is in Oregon, and 32 percent is in Washington.

Following the April 2, 1993, Forest Conference in Portland, Oregon, President Clinton established a Forest Ecosystem Management Assessment Team (FEMAT) to develop options for the management of Federal LSOG-forest ecosystems to provide habitat that would support stable populations of species associated with late-successional forests, including the northern spotted owl. FEMAT developed ten options for the management of LSOG-forest

ecosystems on Federal lands in California, Oregon, and Washington, which are outlined in the Team's report, "Forest Ecosystem Management: An Ecological, Economic, and Social Assessment" (USDA *et al.* 1993). On July 1, 1993, the President identified Option 9 as the preferred alternative for amending the Federal agencies' land management plans with respect to LSOG forest habitat. A modified version of option 9 was adopted in the April 13, 1994, Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (ROD). It is based on a system of late-successional reserves, riparian reserves, adaptive management areas, and a matrix of Federal lands interspersed with non-Federal lands. These designations complemented existing Administratively withdrawn and Congressionally reserved lands.

The adoption of the Forest Plan was subsequently upheld in Federal court. On December 21, 1994, Federal District Court Judge William L. Dwyer rejected plaintiffs' challenges and issued an order upholding the President's Forest Plan.

An underlying premise for the President's selection of the Forest Plan was that Federal lands should carry a disproportionately heavier burden for providing for the conservation of the northern spotted owl, enabling an easing of restrictions on incidental take for the owl on large areas of non-Federal lands. President Clinton thus directed the U.S. Fish and Wildlife Service to issue regulations pursuant to section 4(d) of the Act looking to ease, where appropriate, restrictions on the incidental take of spotted owls on non-Federal lands.

On December 29, 1993, the Service published in the Federal Register a Notice of Intent (NOI) to prepare an Environmental Impact Statement in support of a 4(d) rule for the spotted owl (58 FR 69132). The NOI spelled out various alternative approaches for a 4(d) rule, including a preferred

approach or proposed action. This provided a preliminary opportunity for public input prior to the actual publication of this proposed rule.

Summary of Public Comments on Scoping Notice on 4(d) Rule

The Service received more than 8,500 comments from the public on its scoping notice for a section 4(d) rule EIS for the spotted owl. Most comments received were in response to a January 3, 1994, special mailer sent by the Service to approximately 80,000 recipients. The Service specifically asked for suggestions on issues to be addressed in the 4(d) rule. In general, the comments reinforced issues and concerns identified in previous planning efforts for the spotted owl.

In the scoping notice, the Service sought comments on ten specific issues. The comments received are summarized below, by issue:

(1) Biological, commercial, trade, or other relevant data on the distribution and abundance of the northern spotted owl on non-Federal lands in California, Washington and Oregon.

No new data or information was provided to the Service relative to this issue.

(2) Biological, commercial, trade or other relevant data on the distribution and abundance of the northern spotted owl that identifies the effects of the alternatives for a section 4(d) rule on the northern spotted owl.

No new data or information was provided to the Service relative to this issue.

(3) The scope of the issues that have been identified for the environmental impact statement on a proposed special rule.

In addition to the issues identified in the scoping notice, commenters identified several additional issues for the Service to consider. Several commenters objected to any provision requiring that 40 percent of suitable habitat be retained within the median annual home range circle of an owl located within SEAs, and, because it means that 60 percent of suitable habitat within a home range may be lost, requested an explanation of the biological basis for such a provision. They also requested that the Service consider how habitat modification on non-Federal land will affect owls on adjacent Federal lands.

Comments from non-Federal landowners requested that the Service consider the possible economic benefits of a variety of silvicultural regulations to protect owl habitat. They also asked that the Service evaluate whether the SEA concept fully takes into account the contributions already provided by State agencies and those already in place on Federal lands, and whether the regulatory burden of the SEAs is disproportionate to the benefits.

(4) The range of alternatives that have been identified for the environmental impact statement on a proposed special rule.

A number of commenters provided suggestions for additional alternatives for Service consideration. These included requests to increase or relieve the prohibitions against incidental take, to consider the development of a program based entirely on voluntary participation by forest land managers, to not use SEAs and use only 70 acre owl circles rangewide, and to provide incidental take protection only to landowners who sell to domestic markets. Some commenters requested that the Service provide an alternative with incentives for growing habitat, or to buy or exchange land instead of promulgating a section 4(d) rule. Another sug-

gestion was to transplant spotted owls rather than use a special rule to provide for connectivity, and depend on Federal lands to provide the land base for connectivity.

Other suggested alternatives included using existing exceptions to prohibitions, such as the HCP process, in combination with a final recovery plan for the owl; protecting previously proposed critical habitat on private lands in addition to, or instead of, the SEAs; and applying the 50-11-40 rule to SEAs in addition to, or instead of, retaining 40 percent of suitable habitat within a home range.

Modifications of the alternatives were also suggested. Some examples include replacing the SEAs in Washington with the areas proposed to the Washington Forest Practices Board in a report by the Spotted Owl Scientific Advisory Group (SAG report), to add an SEA for southwestern Washington, and to reduce or exclude the Olympic Peninsula SEA.

Comments specific to California alternatives included requests to provide a separate 4(d) rule for California; to apply the Washington/Oregon approach with SEAs to California; to repeal existing owl rules and designate specific "no take" areas; and to maintain existing prohibitions of take and adopt the California Board of Forestry's new late-successional forest rules.

(5) Input on how suitable habitat for the marbled murrelet should be identified and how it should be protected, and data on marbled murrelet distribution and abundance on non-Federal lands.

Numerous comments were received on the marbled murrelet, with most stating that it is inappropriate to include the murrelet in the regulatory process for the spotted owl because not enough information about murrelets is available at this time to attempt a regulatory definition of incidental take, and that any rule for the murrelet should be done

separately. One commenter stated that the Service should consider adopting an interim 4(d) rule for marbled murrelets that can be refined at a later date because they are associated with the same forest ecosystem as the spotted owl, and that all suitable murrelet habitat should be addressed including marine habitat. Another suggested that, in identifying marbled murrelet habitat, the emphasis should be on a definition that recognizes large contiguous areas of habitat capable of supporting large numbers of birds, and not on defining the lowest possible quantity and stand size used.

(6) Input on the use of "local options" to allow individuals to propose adjustment to prohibitions against take of northern spotted owls without going through the normal habitat conservation planning process.

The potential use of the local option plan was responded to favorably by many commenters. Most said that a "local option" plan should be included as an additional tool to protect owls and to provide landowner flexibility, and that these should provide the same legal protection as HCPs. Others stated that the rule should provide flexibility for applying local options based on the expertise and knowledge of State forestry associations, State governments, and forest landowners.

(7) Consideration of a small landowner exemption for non-commercial forest land of ten acres or less.

Many commenters addressed this issue with the majority recommending that the Service carefully examine and explain the rationale and biological basis for such an exemption, and suggesting that any provision to have less restrictive measures for small landowners would unfairly shift the burden of responsibility to the larger landowners. Others suggested that such an exemption may tend to break large ownerships into smaller ownerships. Some expressed the view that while

appealing, it may set up an arbitrary distinction between landowners based on size, and that the 10 acre size specified in the scoping notice was too small to be meaningful.

(8) Boundaries of the SEAs in the proposed action, including the impacts and effects of alternative boundaries.

Few suggestions were received relative to specific boundary changes. Many comments were received regarding the number of SEAs, the designation or lack of designation of specific SEAs, and the general use of the SEA concept. Among the comments specific to the boundaries was the suggestion that the Mineral Block and I-90 Corridor SEAs should extend no farther west than necessary to provide reasonable connectivity between the Federal conservation areas to the north and south.

Regarding the Olympic Peninsula SEA, comments included the assertion that there should be no SEA on the Olympic Peninsula because Federal lands should be relied on for owl conservation in this area. Another suggestion was that the Service move the southern boundary of the proposed Olympic Peninsula SEA northward to run east and west from the southern boundary of the Olympia National Forest. It was further suggested that only the State of Washington's Olympic Experimental Forest be included in the SEA for the Olympic Peninsula, and that this SEA be rescinded following the approval of an HCP for the State Forest.

Many commenters were specifically concerned about the failure to designate the white Salmon landscape as an SEA to provide demographic interchange between owls on the Yakima Indian Reservation and Federal lands in the eastern Washington Cascades. Other commenters noted that there is no demonstrated need for an SEA in the White Salmon or Hood River areas.

Many commenters asked that the Service provide the scientific basis for determining the configurations and boun-

daries of the SEAs. There were further suggestions that for SEA boundaries, the rule must specify the requirements of "owl shadows" (restrictions on adjacent lands near an owl site center) both within and outside of SEA's. Some commenters stated that the Service should eliminate all SEAs as they would provide further harvest restrictions which would be unduly burdensome, and that they go beyond the Act by mandating conservation measures on privately owned land.

(9) Possible mitigation measures, such as multi-species Habitat Conservation Plans or conservation agreements that provide long-term enforceable and protective land management prescriptions for non-Federal lands.

Several commenters referenced the use of the HCP process, requesting that the Service clarify the relationship between HCPs and the 4(d) rule. Specifically, they asked, in the absence of an SEA designation, what guarantees would there be that habitat will be protected between the time the 4(d) rule goes into effect (and relief is granted) and the time HCPs are completed. There was also concern expressed that there may be a lack of incentives for other landowners to develop HCPs if there is no SEA designated. Others suggested the 4(d) rule state that it will not apply to lands covered by an approved HCP. Specific to California were recommendations that the Service encourage the State to continue to recognize Federally approved HCPs as a valid means of complying with regulations the State adopts as a result of the 4(d) process.

(10) Retention of Federal incidental take restrictions for Indian forest included within the boundary of an SEA.

Many comments were received regarding this issue, and most suggested that it may be inappropriate to impose Federal take prohibitions on tribal lands. One commenter stated that in promulgating the special rule, the Service should direct attention to the special status of Indian tribal lands as distinct

and separate in treatment from other non-Federal State and private lands; the Service should adopt a special rule that exempts Indian forest lands from the prohibitions against incidental take, including any that may be in SEAs.

Some proponents of owl protection stated that the Service should not lift take prohibitions on tribal lands in the absence of criteria to ensure that the owl is adequately protected by tribal management practices. They noted that progress on the part of the tribes is variable, and this should be evaluated before lifting restrictions within SEAs. Others commented that the special rule should ensure that measures governing incidental take of the owl on Indian forest lands contribute to the conservation of the species.

In addition to the ten issues for which the Service requested input, comments were received on numerous other issues relative to the proposed action. Three general areas of interest were common in the comments from non-industrial landowners—(1) the proposed section 4(d) rule was a disincentive to grow habitat for spotted owls and to practice good silviculture; (2) the proposed rule represented an unconstitutional taking of private property and that private landowners should be compensated; and (3) the proposed 4(d) rule places an unfair burden on non-Federal lands and actually provides little relief to private lands.

Comments from industrial landowners included a request for "safe harbor" from prosecution if the requirements of the 4(d) rule were met and more that 40 percent suitable habitat was left within an owl circle after harvest; and the suggestion that the 4(d) rule assist in addressing the issue of access across Federal lands to non-Federal lands. Concern also was expressed about potential conflict with anti-trust laws when implementing, among several landowners, the requirement that 40 percent suitable habitat be left within a home range circle, and some asked that an anti-trust exemption be provided for multiple landowners who have to deal with

landscape issues. One commenter also asserted that the creation of SEAs is a de facto designation of critical habitat that must comply with the requirements of s4(B)(2). Several commenters stated that there is no legal basis under the Act for burdening private lands with recovery of a threatened species, and that the 4(d) rule was essentially a recovery mechanism being forced on private lands.

Proponents of spotted owl protection alleged that the scientific basis for the proposed action is unclear, and it is particularly unclear in how it relates to the recovery standards and objectives for the owl. They suggested that any special rule for the spotted owl must be part of a coordinated recovery approach among all Federal agencies with responsibility for references to the SAG report, and that the special rule should provide the level of protection as proposed in the SAG report.

Several commenters asked that the rule provide clearer definitions for "take" and "suitable habitat." There were requests for information on the land ownership within SEAs, the number of owls present, and the anticipated level of incidental take. Others also requested information regarding the specific acreage of State and private lands off limits to harvest under the proposed action. There also were questions about how the rule would describe and determine the 70 acres to be protected around active spotted owl nests outside of SEAs.

After reviewing these public comments, as well as other owl management strategies and analyses, the Service now proposes this special rule in response to the President's directive to review the blanket set of incidental take prohibitions for the northern spotted owl that has been in effect since the listing. In particular, this proposed rule would relax incidental take restrictions for the owl for timber harvests for certain non-Federal lands in Washington and northern California. *This proposed special rule excludes*

Oregon, however, and does not propose any changes in the regulatory prohibitions to protect the owl which are currently applicable within that State. In March and December 1994, the Service received letters from the Oregon Congressional Delegation requesting that further work on a 4(d) rule for Oregon be suspended to provide an opportunity for consensus to emerge among State officials and private landowners on a strategy for the conservation of the spotted owl. *Recognizing the benefits that such a consensus approach offers, the Service agreed in May 1994, to suspend further work on a federally developed 4(d) special rule proposal for Oregon in order to encourage the development of a "stakeholder" based "Oregon Alternative".*

The Governor's office in Oregon has taken the lead in working cooperatively with non-Federal landowners through the Oregon Forest Industries Council, Oregon Small Woodlands Association, Northwest Forestry Association, Douglas County, and others to develop an alternative owl conservation strategy. The Service is supportive of this approach and is willing to review and consider any State conservation proposal which results from this process.

Under the existing regulatory structure implementing section 4(d) of the Endangered Species Act, each section 4(d) "special rule" for a threatened species must contain all of the applicable prohibitions and exceptions for that species throughout its range (50 CFR 17.31(c)). Thus, in the past, Oregon would have been included in this proposed 4(d) rule, even if only to preserve the current regulatory status quo protecting the spotted owl in Oregon.

In reviewing the request for exclusion from Oregon, the Service has assessed whether it would be advantageous to adopt a new approach for dealing with special rule situations in the future by authorizing the revision of a listing of a threatened species through the subsequent publication of a special rule that covers only part of, but not all of, the range

of the species. Under this approach, the general prohibitions and exceptions applicable to threatened species not covered by special rules would continue to apply in that part of the range of the species not included under the provisions of a subsequent special rule. After consideration of the relevant factors on this matter, the Service has decided to adopt this new approach for special rules and is simultaneously proposing additional technical amendments to 50 CFR 17.11 and 50 CFR 1731(c) to accomplish this change.

In the specific case of the northern spotted owl, .the *owl was originally listed as threatened without a special rule, and is subject to the same general prohibitions and exceptions which are applicable to endangered species pursuant to the current provisions of 50 CFR 17.31(a). These general prohibitions include a rangewide prohibition against the incidental take or harm of an owl. These prohibitions apply throughout the owl's range, including the State of Oregon. The Service now proposes a section 4(d) special rule for the owl that applies only to the States of Washington and California.* Because the proposal for a special rule only encompasses Washington and California, under its current formulation owls in Oregon would remain fully protected against incidental take or harm under the prohibitions established for the owl when it was originally listed. As previously noted, the Service is presently proposing the requisite technical changes to 50 CFR 17.11 and 50 CFR 17.31(c), as discussed above, to allow for the issuance of a special rule that applies to only part of the range of a threatened species like the spotted owl, *while retaining the original protective prohibitions for the remainder of the species' range in Oregon.*

If a new "Oregon Alternative" proposal for the owl is subsequently developed which is found to be consistent with the requirements of the Act, the Service will initiate an analysis of the new proposal under the National

Environmental Policy Act and initiate appropriate regulatory proceedings at that time.

Section 4(d) of the Endangered Species Act

The scope and authority for this proposed rule stems from section 4(d) of the Act, which grants the Secretary of the interior broad administrative discretion to promulgate regulations that he deems to be necessary and advisable to meet the conservation objectives for a threatened species. The section also confers authority to the Secretary to apply to a threatened species any or all of the prohibitions against take that the Act makes expressly applicable to endangered species. The pertinent parts of section 4(d) provide:

> * * *Whenever any species is listed as a threatened species pursuant to subsection (C) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) . . . with respect to endangered species.* * *

As applied, this provision empowers the Service to promulgate a special rule which adopts species-specific protective regulations upon listing a species as threatened. Such a special rule may include imposition of the section 9(a) prohibition against "take," in some or all of its particular manifestations, and in all or a portion of the species' range, as well as other protective measures. While Congress expressly mandated certain protections for endangered species by statute (the section 9(a) (1) prohibitions), it intended to provide the service with flexibility in determining what protections are necessary and advisable for threatened species. Section 4(d) is that grant of rulemaking authority, and it provides the Secretary with broad discretion to adopt regulations for the conservation of threatened species.

In many circumstances the Service declines to issue a special rule for a threatened species at the time it is listed, often because the Service does not have sufficiently specific knowledge or the resources necessary to develop a tailor-made rule. In this event, the general threatened species regulations at 50 CFR 17.31 come into effect, which provide for automatic application to threatened species of the prohibitions the Act itself makes applicable to endangered species. These "blanket" prohibitions act as a "safety net" for threatened species until such time as the Service determines that it is appropriate to issue a special rule for the species.

This latter course has been followed with respect to the northern spotted owl. When the species was listed as threatened in June of 1990, the Service did not promulgate a species-specific special take rule under Rule 4(d), and thus the blanket prohibitions were triggered into effect. The Service now has determined that it is appropriate to issue a special rule tailor-made for this species, based on the Service's more particularized knowledge about the respective conservation needs of the owl across the various portions of its range, and the change in LSOG-forest management occasioned by adoption of the Forest Plan. Because this proposed rule does not involve regulated take, e.g., authorization of private predator control or sport seasons, the provisions of section 3(3) regarding examination of population pressures are not invoked.

The adoption of the Forest Plan—a comprehensive, interagency strategy for management of Federal-LSOG forests in the owl's range designating nearly 7.5 million acres as late-successional reserves—is the major predicate for the Service's proposal of this special rule for the owl. Upon issuing the Biological opinion on the Forest Plan, the Service stated that the plan "will accomplish or exceed the standards expected for the Federal contribution to recovery of the northern spotted owl and assurance of adequate habitat for its

reproduction and dispersal." Thus, the Forest Plan is the primary foundation block for owl recovery. This proposed rule would complement the Forest Plan and provide for the conservation of the owl by retaining taking prohibitions on non-Federal lands in a manner designed to build on the protections the Forest Plan has provided. Further, the Service has concluded that the owl take prohibitions that would no longer apply under this proposed rule are no longer either necessary or advisable to provide for the conservation of the owl, especially in light of the Forest Plan's adoption.

In addition, as has been the case in other section 4(d) regulations, the proposed rule ultimately would promote overall owl recovery efforts in other ways. For example, with respect to a 4(d) rule issued for the threatened population of gray wolves (Canis lupus) in Minnesota, the Service determined that a government-implemented depredation control program that includes the possibility of lethal control measures would alleviate a source of public hostility to the wolf and would, therefore, be protective of the species (see 50 CFR 17.40(d)). For the Louisiana black bear (Ursus americanus luteolus), the Service promulgated a regulation under section 4(d) that authorized the unintentional take of bear incidental to normal forest practices so long as suitable habitat diversity for the bear was maintained (see 50 CFR 17.40(i); 56 FR 588, 593). As another instance, the Service has proposed to authorize the take of the threatened coastal California gnatcatcher (Polioptila californica californica) incidental to land use activities conducted in accordance with a State of California-sponsored Natural Community Conservation Plan (58 FR 16758). In the case of the northern spotted owl, the Service is coordinating applicability of the take prohibition with the comprehensive management strategy in the Forest Plan and the initiation of a comprehensive campaign to encourage Habitat Conservation Planning in key portions of the owl's range.

Generally, incidental take could involve either the harm or harassment of a spotted owl. The harassment of the northern spotted owl would occur through disturbance of active nesting pairs or territorial single owls within an activity center; harm would result from significant owl habitat removal around and beyond spotted owl site centers.

Incidental Take of Spotted Owls: "Harassment"

Timber harvest and related activities that disturb the breeding and nesting functions of spotted owls within activity centers during the breeding season can be considered incidental harassment of individual spotted owls. Incidental harassment may include activities that could result in disturbance of nesting spotted owls or the abandonment of eggs, nestlings, or fledgling spotted owls. More specifically, incidental harassment of spotted owls generally can include harvest activities that occur within the closest 70 acres of suitable habitat surrounding a site center during the owl's reproductive period. (The reproductive period generally is between March 1 and September 30 of each year. These dates may be modified where credible scientific information establishes a different time period for a given area.) Actions with the potential to disturb nesting spotted owls include, but are not limited to, harvest related activities such as felling, bucking, and yarding; road construction; and blasting.

A study by Miller (1989) examined the area used by fledgling spotted owl juveniles in Oregon. Radio-telemetry data showed that the average amount of nesting, roosting, and foraging habitat used by fledgling spotted owls prior to dispersal was approximately 70 acres in size. Under existing conditions in many areas, these activity centers are seldom evenly distributed around a nest tree. Mortality rates for juvenile spotted owls are significantly higher than for adults (Forsman et al. 1984, Gutierrez et al. 1985, Miller 1989). Studies of juvenile dispersal in Oregon and California indicated that few of the juvenile spotted owls survived to

reproduce (Miller 1989, Gutierrez *et al.* 1985). These research studies all reported very high mortality during pre-dispersal.

Based on this and other information, the Service believes that the maintenance of the closest 70 acres of existing suitable (nesting, roosting, and foraging) habitat surrounding the nest tree will contribute to a secure core area and is crucial to maximize fledgling success and to provide a partial buffer against disturbance around the site center. To avoid harassment, resident spotted owls are considered to be nesting unless surveys conducted during the breeding season indicate that not to be the case.

Incidental Take of Spotted Owls: "Harm"

To successfully reproduce and maintain populations, studies have suggested spotted owls require substantial quantities of suitable (nesting, roosting, and foraging) habitat arrayed around their site centers.

A number of radio-telemetry studies have described the quantity and characteristics of habitat used by spotted owls. Studies by Hayes et al. (1989) found a strong positive relationship between the abundance of spotted owls and the percentage of older forests in the study area. A similar analysis was performed on data collected by Bart and Forsman (1992). The results showed that the number of spotted owls per square mile, pairs of owls per square mile, young per square mile, and young per pair increased with increasing amounts of older forest within the study area. Productivity (number of young fledged per pair) increased significantly with increasing amounts of older forest. Productivity in areas with greater than 60 percent older forest was approximately three times higher than productivity in areas with less than 20 percent older forest.

Documentation in the 1990 Status Review of the Northern Spotted Owl (USDI 1990a) indicates that productivity per pair is lowest in areas with small amounts of older forest. This strongly suggests that, even if some spotted owls persist in such areas, there is reason to believe they are not reproducing and surviving at replacement levels.

The above research findings have supported the determination in the past that reduced quantities of suitable habitat are likely to result in lower spotted owl abundance and productivity rates. It has also been suggested that a significant reduction of nesting, roosting, and foraging habitat within the median annual home range of a spotted owl pair or resident single creates a much higher risk of adverse effects that actually kill or injure owls by significantly impairing essential behavioral patterns, including breeding, feeding, and/or sheltering. These are the primary elements of effects that ultimately can cause harm to, and the incidental take of, spotted owls.

Recognizing the need to assist the public in avoiding the incidental take of listed species, the Fish and Wildlife Service and the National Marine Fisheries Service (NMFS) issued a joint policy statement on July 1, 1994, committing the agencies to provide as much guidance and assistance to the general public as possible so as to avoid liability under the ESA for incidental takings (59 FR 34272, 1994). The policy statement also committed the agencies to designate in future listing packages a key contact person within either the Service or NMFS, as appropriate, to answer incidental take questions from the general public.

In the particular case of the spotted owl, the Service has encouraged the public to conduct owl surveys of property proposed for harvest or development, as a primary means of avoiding harassment or harm to an owl. The Service has recommended that such surveys be conducted according to a

March 17, 1992, Service-endorsed survey protocol (USFWS 1992), available upon request from the FWS Ecological Services State Offices listed below:

Sacramento Field Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite E-1803, Sacramento, California 95825, 916-978-4866, Attn: Field Supervisor Oregon State Office, U.S. Fish and Wildlife Service, 2600 S.E. 98th Avenue, Suite 100, Portland, Oregon 97266, 503-231-6179, Attn: Field Supervisor Washington State Office, U.S. Fish and Wildlife Service, 3704 Griffin Lane S.E., Suite 102, Olympia, Washington 98501-2192, 206-753-9440, Attn: Field Supervisor

Biology of the Northern Spotted Owl

The spotted owl is a long-lived bird that has a high degree of nest-site fidelity within an established territory. This proposed rule incorporates, by reference, recent documents addressing the biology and ecology of the spotted owl, its habitat, and associated management strategies in Washington, Oregon, and California, including: the final rules listing the spotted owl as threatened and designating its critical habitat; the Interagency Scientific Committee (ISC) report (Thomas et al. 1990); the Scientific Analysis Team report (Thomas *et al.* 1993); the final draft Recovery Plan for the Northern Spotted Owl (USDI 1992); the Forest Ecosystem Management Assessment Team (FEMAT) report (USDA *et al.* 1993); the supporting documents for the Forest Plan (USDA/USDI 19946 a and b); and the Contribution of Federal and Non-Federal Habitat to Persistence of the Northern Spotted Owl on the Olympic Peninsula, Washington (Holthausen *et al.* 1994). The proposed rule also considered the Washington Spotted Owl Scientific Advisory Group reports (Hanson et al. 1993 and Buchanan et al. 1994).

The range of the spotted owl has been divided into 12 physiographic provinces (USDA/USDI 1994a): the Eastern

and Western Cascades, Western Lowlands, and Olympic Peninsula Provinces in Washington; the Eastern and Western Cascades, Coast Range, Willamette Valley, and Klamath Provinces in Oregon; and the Klamath, Coast, and Cascades Provinces in California. The Klamath province was divided into two subprovinces by State—the Oregon Klamath Province and the California Klamath Province—even though the two provinces are part of the same geographic area (Figure 4 to s17.41(c)).

Habitat Characteristics

Northern spotted owls generally have large home ranges and use large tracts of land containing significant acreage of older forest to meet their biological needs. The median annual home range size of a northern spotted owl, which varies in size from province to province, is approximated by a .circle centered on an owl site center. Estimated median annual home range sizes represent the area used by half of the spotted owl pairs or resident singles studied to date within each province to meet their annual life history needs.

Home range sizes were estimated by analyzing radio-telemetry home range data from studies conducted on the annual movements of spotted owl pairs, referenced in the 1990 Status Review (1990a) and the Interagency Scientific Committee report (Thomas et al. 1990).

Based on studies of owl habitat preferences, including habitat structure and use and prey preference throughout the range of the owl, spotted owl habitat consists of four components: (1) Nesting, (2) roosting, (3) foraging, and (4) dispersal. Although this habitat is variable over the range of the spotted owl, some general attributes are common to the owl's life-history requirements throughout its range. The age of a forest is not as important for determining habitat suitability for the northern spotted owl as the structure and composition of the forest. Northern interior forests typically

may require 150 to 200 years to attain the attributes of nesting and roosting habitat; however, characteristics of nesting and roosting habitat are sometimes found in younger forests, usually those with significant remnant trees from earlier late-successional stands.

The attributes of superior nesting and roosting habitat typically include a moderate to high canopy closure (60 to 80 percent closure); a multi-layered, multi-species canopy with large overstory trees; a high incidence of large trees with various deformities (e.g., large cavities, broken tops, mistletoe infections, and debris accumulations); large accumulations of fallen trees and other debris; and sufficient open space below the canopy for owls to fly (Thomas, *et al.* 1990).

Spotted owls use a wider array of forest types for foraging, including more open and fragmented habitat. Habitat that meets the spotted owl's need for nesting and roosting also provides foraging habitat. However, some habitat that supports foraging may be inadequate for nesting and roosting. In much of the species' northern range, large, dense forests are also chosen as foraging habitat, probably because they provide relatively high densities of favored prey, the northern flying squirrel (Glaucomys sabrinus), as well as cover from predators. Because much of the flying squirrel's diet is fungal material, old decadent forests provide superior foraging habitat for owls. In southern, lower-elevation portions of the owl's range, the species often forages along the edges of dense forests and in more open forests, preying on the dusky- footed woodrat (Neotoma fuscipes).

In general terms, suitable habitat means those areas with the vegetative structure and composition necessary to provide for successful nesting, roosting and foraging activities sufficient to support a territorial single or breeding pair of spotted owls. Suitable habitat is sometime referred to as nesting, roosting and foraging (NRF) habitat.

Although habitat that allows spotted owls to disperse may be unsuitable for nesting, roosting, or foraging, it provides an important linkage among blocks of nesting habitat both locally and over the range of the northern spotted owl. This linkage is essential to the conservation of the spotted owl. Dispersal habitat, at a minimum, consists of forest stands with adequate tree size and canopy closure to provide some degree of protection to spotted owls from avian predators and to allow the owls to forage at least occasionally.

Suitable and dispersal habitat vary by province and are described separately under the discussion of each province in the following section.

Discussion of Spotted Owl Provinces by State

As previously noted, the range of the northern spotted owl has been subdivided into 12 separate provinces (Figure 4 to s17.41(c)). For purposes of this rule, the Klamath province has been divided into two provinces by State—the California Klamath province and the Oregon Klamath province--even though the two provinces are part of the same geographic area. In California, the three provinces are the California Cascades, California Klamath, and California Coast. The Oregon Coast Ranges, Willamette Valley, Oregon Klamath, Western Oregon Cascades, and Eastern Oregon Cascades constitute the five provinces of Oregon. The four Washington provinces are the Eastern Washington Cascades, Western Washington Cascades, Western Washington Lowlands, and the Olympic Peninsula. Only the seven provinces in Washington and California are the subject of incidental take prohibition modifications under this proposed rule and will therefore be discussed in more detail below.

Washington

1. Washington Olympic Peninsula Province

The Washington Olympic Peninsula province is bordered by the Pacific ocean on the west, the Straits of Juan de Fuca on the north, Hood Canal on the east, and State Highway 12 to the south (Figure 4 to s17.41(c)). Of the three million acres in the province, approximately 51 percent are in Federal ownership. The central portion of the province is high, mountainous terrain, surrounded by lower elevation forest that provides habitat for the spotted owl. Almost all Federal lands on the Peninsula have either been designated as a late successional or riparian reserves under the Forest Plan or have been Congressionally withdrawn from timber harvest; only 8,400 acres of Federal forest land on the Peninsula are available for programmed timber harvest. In general, the province is demographically isolated from other parts of the owl's range. Natural catastrophic events such as windstorms and wildfires are threats that have the capability of destroying thousands of acres of habitat.

The recent report by Holthausen et al. concluded that "* * * it is likely, but not assured, that a stable population of owls would be maintained * * *" on Federal lands in the Olympic Peninsula Province. However, the report also notes it would be "unlikely" that owls would persist on "* * * the western coastal strip of the National Park, * * *" if non-Federal habitat on the western side of the Peninsula were excluded from current Federal protection for owls. The report went on to explain that "the retention of non- Federal habitat in the western portion of the peninsula was particularly significant and provided for a larger area of core habitat on Federal land in model analyses. In addition, the retention of this habitat would likely increase the chances of maintaining a population on the coastal strip of the Olympic National Park." When comparing the relative value of an SEA on the western side of the Peninsula with a possible

SEA on the northern side of the Peninsula, the report noted that the western SEA "made a much greater contribution to owl numbers and occupancy rates than did the northern SEA * * *. Mean numbers of pairs over the 100-year simulation was as large with the western SEA alone as with both SEAs." Thus, non-Federal lands on the northern portion of the Peninsula were not viewed as having any appreciable capability of making a significant contribution to the long-term conservation of the spotted owl on the Olympic Peninsula.

Finally, the report stated that attempts to maintain a "habitat connection across southwestern Washington * * * would have little effect on the status of the owl population on the Peninsula if that population was stable or nearly stable." In other words, recent analysis suggests that the likelihood of addressing past concerns about the need to connect the Olympic Peninsula owl population to southwestern Washington owls in order to maintain a viable population is very low, given current conditions, especially when relying on the application of incidental take prohibitions. According to Holthausen, *et. al*, "* * * the populations of owls on the Peninsula is sufficiently large to avoid any short to mid-term loss of genetic variation, * * *" Except for the western portion of the Peninsula where non-Federal lands are still important, the major problem for owls on the Peninsula is the past loss of suitable habitat on Federal lands.

a. NRF Habitat. NRF habitat on the Olympic Peninsula consists, as a general matter, of coniferous or mixed coniferous/hardwood forest with multiple canopy layers; multiple large overstory conifers greater than 20 inches in diameter at breast height (dbh); and total canopy closure among dominant, co-dominant and understory trees of greater than 60 percent.

b. Dispersal Habitat. Dispersal habitat on the Olympic Peninsula consists, as a general matter, of coniferous or

mixed coniferous/hardwood forest with smaller dominant trees or lower canopy closure than NRF habitat; multiple canopy layers of multiple large overstory conifers greater than 10 inches dbh; and a total canopy closure among dominant, co-dominant and understory trees of greater than 60 percent.

2. Western Washington Lowlands Province

This province consists of the lowlands outside of the Olympic Province that extend east from the Pacific Ocean to the western foothills of the Washington Cascades (Figure 4 to § 17.41(c)). The Canadian border forms the northern boundary and the Columbia River the southern boundary of the province. Forest lands in the north and central portions of the province along Puget Sound have been converted to agricultural, industrial and urban areas. The southwestern portion is dominated by commercial tree farming. Of the 6.5 million acres within this province, only one percent is under Federal management.

a. NRF Habitat. NRF habitat in the Western Washington Lowlands consists, as a general matter, of coniferous or mixed coniferous/hardwood forest with multiple canopy layers; multiple large overstory conifers greater than 20 inches dbh; and total canopy closure among dominant, co-dominant and understory trees of greater than 60 percent.

b. Dispersal Habitat. Dispersal habitat in the Western Washington Lowlands consists, as a general matter, of coniferous or mixed coniferous/hardwood forest with smaller dominant trees or lower canopy closure than NRF habitat; multiple canopy layers of multiple large overstory conifers greater than 10 inches dbh; and a total canopy closure among dominant, co-dominant and understory trees of greater than 60 percent.

Spotted owls in this province have extremely low population levels due to isolation of populations within the

province and limited nesting, roosting, and foraging habitat. The limited amount of habitat in this province also contributes to the demographic isolation of the Olympic Peninsula Province. As noted previously in the discussion on the Olympic Peninsula, however, the recent study by Holthausen *et al.* suggested that even substantial conservation efforts in Southwest Washington would be unlikely to make any meaningful contribution to maintaining a stable, long-term population of owls on the Olympic Peninsula. Thus, while Southwest Washington is important as part of the historic range of the owl, the continued application of blanket incidental take prohibitions to the exceptionally limited suitable habitat that still exists there makes any contribution to owls on the Olympic Peninsula minimal at best.

Currently, the Service is attempting to address these conservation opportunity limitations through a creative new approach which targets the development of comprehensive multi-species Habitat Conservation Plans with several of the large landowners in this province. The Service has premised this cooperative approach, as opposed to designating this area as a Special Emphasis Area, on the positive commitments it has received from major landowners in this region to negotiate comprehensive HCPs. In addition, one of the landowners has entered into a "take avoidance" agreement while working on their HCP. The take avoidance agreement insures that no owls will be lost as the result of timber harvest during the period in which the HCP is being developed.

3. Western Washington Cascades Province

The Western Washington Cascades province occupies the land west of the Cascades crest, from the Columbia River north to the Canadian Border and west to the Western Washington Lowland province (Figure 4 to s17.41(c)). This province contains about 6.1 million acres of land, of which approximately 61 percent is in Federal ownership. Most of the non-federal lands occur along the western edge of the

province and along the major mountain passes in checkerboard ownership with Federal lands.

a. NRF Habitat. NRF habitat in the Western Washington Cascades Province consists, as a general matter, of coniferous or mixed coniferous/hardwood forest with multiple canopy layers; multiple large overstory conifers greater than 20 inches dbh; and total canopy closure among dominant, co-dominant and understory trees of greater than 60 percent.

b. Dispersal Habitat. Dispersal habitat in the Western Washington Cascades Province consists, as a general matter, of coniferous or mixed coniferous/ hardwood forest with smaller dominant trees or lower canopy closure than NRF habitat; multiple canopy layers of multiple large overstory conifers greater than 10 inches dbh; and a total canopy closure among dominant, co-dominant and understory trees of greater than 60 percent.

A Habitat Conservation Plan (HCP) was recently approved by the Fish and Wildlife Service to cover Murray Pacific Corporation lands in Lewis County in this Province. The permit for this 100-year Habitat Conservation Plan for the northern spotted owl was signed on September 24, 1993, for the Murray Pacific Corporation, a Tacoma, Washington, based timber company. The plan provides for the development and maintenance of dispersal habitat for the spotted owl that is well distributed over the 54,610 acres of the company's land, while allowing limited taking of spotted owls that is incidental to the company's timber harvest activities.

The Murray Pacific planning area is situated between the Mineral Block (an isolated block of Forest Service land) and the main portion of the Gifford Pinchot National Forest, that is located immediately south of Mt. Rainier National Park. The Mineral Block has been designated as a late-successional Federal reserve under the Forest Plan. The management of

Murray Pacific property will promote the opportunity for the dispersal of spotted owls to and from this isolated reserve, providing a link with the Cascade Mountains population. The Mineral Block also hosts the most westerly extension of spotted owls in the Cascade Mountains.

General threats to the spotted owl in this province include low population levels, limited habitat in the northern portion of the province, declining habitat, and dispersal problems in areas of limited Federal ownership.

4. Eastern Washington Cascades Province

This province lies east of the crest of the Cascades Mountains from the Columbia River north to the Canadian Border (Figure 4 to s17.41(c)). The province extends east to where suitable spotted owl habitat naturally diminishes and drier pine forests become prevalent. Approximately 62 percent of the province's 5.7 million acres is in Federal ownership.

a. NRF Habitat. NRF habitat in the Eastern Washington Cascades Province consists, as a general matter, of coniferous forest with stands that contain greater than 20 percent fir (Douglas fir, grand fir) and/or hemlock trees; multiple canopy layers of multiple large overstory conifers greater than 12 inches dbh; and a canopy closure among dominant, co-dominant and understory trees of greater than 50 percent.

b. Dispersal Habitat. Dispersal habitat in the Eastern Washington Cascades Province consists, as a general matter, of coniferous forest with stands that contain greater than 20 percent fir trees with smaller dominant trees or lower canopy closure than NRF habitat multiple canopy layers of multiple large overstory conifers of greater than 11 inches dbh; and total canopy closure among dominant, co-dominant and understory trees of greater than 50 percent.

Threats to the spotted owl in this province include natural fragmentation of spotted owl habitat by geological features; loss of spotted owl habitat from wildfires; loss of habitat from timber harvest activities; and low spotted owl populations in some areas of the province.

California

1. California Coastal Province

Extending from the Oregon border south to San Francisco Bay, this province lies west of the Six Rivers and Mendocino National Forests (Figure 4 to s17.41(c)). It consists of approximately 5.6 million acres, of which about 87 percent is in non-Federal ownership. Timber management is the primary land use on about 2 million acres, and is concentrated in the heavily-forested redwood zone located within 20 miles of the Pacific Ocean coastline. In the more inland and southerly portions of the province, owl habitat is largely confined to the lower portions of drainages and is naturally fragmented by grasslands, hardwoods, and chaparral, as well as by agricultural and urban areas.

a. NRF Habitat. NRF habitat in the California Coastal Province consists, as a general matter, of coniferous or mixed coniferous/hardwood forests with multiple canopy layers; multiple overstory conifers greater than 16 inches dbh; and total canopy closure among dominant, co-dominant, and understory trees of greater than 60 percent. Some nest sites may occur in stands of smaller trees or with a lower canopy closure; however, such sites are not typical.

b. Dispersal Habitat. Dispersal habitat in the California Coastal Province consists, as a general matter, of coniferous or mixed coniferous/hardwood forests, with smaller dominant trees or lower canopy closure than in NRF habitat; multiple canopy layers, with multiple large overstory conifers greater than 10 inches dbh; a total canopy closure among dominant, co-dominant; and understory trees of greater than 40 percent.

This province is unique in that it supports several hundred pairs of spotted owls (over 1/3 of the State's population) within managed second-growth timber stands. Factors that appear to contribute to the suitability of these second-growth stands include the rapid growth of trees in the coastal environment, the prevalence of hardwood understories, and the widespread occurrence of a favored prey species, the dusky-footed woodrat. The primary threat to the spotted owl in this region is habitat alteration, but, due to the spotted owl's widespread distribution, the predominance of selection harvest methods, the rapid regrowth of habitat, and effective and comprehensive State wildlife conservation and forest practice regulations, threats are considered low to moderate in this portion of the spotted owl's range.

Because Federal lands in this province are limited, they play a small role in spotted owl conservation in this province. Significant non-Federal contributions to conservation are in place or under development in this area. In addition to efforts by the state, described in more detail later, several large timber companies in the coastal province have made substantial investments in information-gathering and planning for spotted owl conservation. The Simpson Timber Company has completed a Habitat Conservation Plan and received a section 10(a) permit for the incidental take of a limited number of spotted owls on its 380,000-acre property. Pursuant to this plan, Simpson Timber has set aside 40,000 acres of suitable owl habitat for at least ten years, is conducting research on habitat characteristics, and has banded over 600 spotted owls.

2. California Klamath Province

This province lies to the east of the California Coastal province, and is contiguous with the Oregon Klamath province (Figure 4 to s17.41(c)). The California Klamath province consists of approximately 6.2 million acres, of which about 76 percent is in Federal ownership. The U.S.

Forest Service is the primary land manager. About 25 percent of the Forest Service lands in the province are believed to be currently suitable for nesting, roosting, and foraging by the spotted owl.

a. NRF Habitat. NRF habitat in the California Klamath Province consists, as a general matter, of coniferous or mixed coniferous/hardwood forests with multiple canopy layers; multiple overstory conifers greater than 16 inches dbh; and total canopy closure among dominant, co-dominant, and understory trees of greater than 60 percent. Some nest sites may occur in stands of smaller trees or with a lower canopy closure; however, such sites are not typical.

b. Dispersal Habitat. Dispersal habitat in the California Klamath Province consists, as a general matter, of coniferous or mixed coniferous/hardwood forests, with smaller dominant trees or lower canopy closure than in NRF habitat; multiple canopy layers, with multiple large overstory conifers greater than 10 inches dbh; a total canopy closure among dominant, co-dominant; and understory trees of greater than 40 percent.

In many areas of the province, spotted owl habitat is naturally fragmented by chaparral, stands of deciduous hardwoods, and low-elevation vegetation types. In portions of the area, suppression of fire over the last century may have encouraged development of mixed-conifer habitat suitable for spotted owls. However, during the same period, timber harvest has removed substantial amounts of suitable habitat. Owl populations throughout the province were believed to be declining due to habitat loss at the time of listing, and data suggest that populations may well be continuing to decline in the province's only demographic study area (Franklin et al. 1992). In the southern portion of the province, especially on the Mendocino National Forest, spotted owls and nesting, roosting, and foraging habitat are more scattered than in northern areas due to both natural conditions and recent harvest. However, despite extensive habitat fragmentation in

some areas during the last two decades, spotted owl populations appear to remain distributed throughout most parts of the province.

Until the listing of the spotted owl, continued habitat alteration due to clear-cutting was a primary threat to the species in this province. The most important threat to habitat at the present time is wildfire. In the past six years, large fires have destroyed or degraded substantial quantities of owl habitat on the Klamath, Shasta-Trinity, and Mendocino National Forests.

The Hoopa Valley Indian Reservation occupies about 88,000 acres along the western margin of this province. The Hoopa Tribe has conducted forestry operations under section 7 consultation conducted between the Bureau of Indian Affairs and the Service, and is preparing a comprehensive integrated resource management plan for forestry and wildlife on their lands. The Tribe is also developing a Geographic Information System (GIS) data base to integrate spotted owl conservation into its timber management program. The maintenance of adequate dispersal condition in this area would improve the intra-provincial connectivity and dispersal between Federal reserves.

3. California Cascades Province

This province lies east of the California Klamath province. It consists of approximately 2.5 million acres, of which about 46 percent is in Federal ownership (Figure 3 to s17.41(c)). Checkerboard Federal and non-Federal ownership patterns predominate. Due to the relatively dry climate and the history of recurrent wildfires in this province, spotted owl habitat is naturally fragmented by chaparral and stands of deciduous hardwoods. As is the case in the California Klamath Province, the suppression of wildfire over the last century may have encouraged development of mixed-conifer habitat suitable for spotted owls. However, timber harvest

has removed substantial amounts of suitable habitat. Existing spotted owl sites are widely scattered, and the potential for dispersal across the province appears to be limited. This province provides the demographic and genetic linkage between the northern spotted owl and the California spotted owl of the Sierra Nevada range.

a. NRF Habitat. NRF habitat in the California Cascades Province consists, as a general matter, of coniferous or mixed coniferous/hardwood forests with multiple canopy layers; multiple overstory conifers greater than 16 inches dbh; and total canopy closure among dominant, co-dominant, and understory trees of greater than 60 percent. Some nest sites may occur in stands of smaller trees or with a lower canopy closure; however, such sites are not typical.

b. Dispersal Habitat. Dispersal habitat in the California Cascades Province consists, as a general matter, of coniferous or mixed coniferous/hardwood forests, with smaller dominant trees or lower canopy closure than in NRF habitat; multiple canopy layers, with multiple large overstory conifers greater than 10 inches dbh; a total canopy closure among dominant, co-dominant; and understory trees of greater than 40 percent.

Currently, threats in this province include low population numbers, difficulty in providing for interacting population clusters, and fragmented dispersal habitat. Catastrophic wildfire is also an important threat to habitat. In 1992, a 70,000-acre fire in Shasta County substantially reduced the likelihood of contact between the northern spotted owl and the California spotted owl for the next several decades.

Northern Spotted Owl Populations on Non-Federal Lands

Due primarily to historic timber harvest patterns, approximately 75 percent of the known rangewide population of spotted owls is centered on Federal lands. Owl site centers on non-Federal lands are usually found in remnant stands of older forest, or in younger forests that have had time to

regenerate following harvest. In addition, adjacent forested non-Federal lands can provide foraging and dispersal habitat for owls whose site centers are on Federal lands.

As of July 1, 1994, there were 5,431 known locations, or site centers, of northern spotted owl pairs or resident single owls in Washington, Oregon, and California (located between 1989 and 1993)—851 sites (16 percent) in Washington, 2,893 (53 percent) in Oregon, and 1,687 (31 percent) in California. In Washington and Oregon, owl site centers on non-Federal lands are typically widely scattered. Currently, 1,319 or 24 percent of known owl site centers are located on non-Federal lands--140 in Washington, 342 in Oregon, and 837 in California. Of those in California, 631 or 75 percent of the site centers located on non-Federal lands are located in the California Coast Province, where owls are relatively common in second-growth timber stands. Site centers in the interior provinces of California are typically scattered. In addition to the site centers located on non-Federal lands in Washington, Oregon, and California, preliminary analyses indicate that there are 151 site centers in Washington, 810 centers in Oregon, and 204 centers in California, located on Federal lands that are dependent upon some percentage of suitable owl habitat on adjacent non-Federal lands to support the owls.

Non-Federal lands in certain portions of the owl's range are still necessary to support and supplement the Federal lands-based owl conservation strategy. While the type of support needed varies depending on local conditions, the three general types of conservation support needed within specially designated areas are:

(1) Habitat on non-Federal lands near Federal reserves where existing owl populations are low to provide demographic support for owl populations. Areas that are needed to provide demographic support for Federal reserves include, in Washington: the western portion of the Olympic Peninsula

Province and portions of the Eastern and Western Cascade provinces; and in California: the Cascades Province and the southern portion of the Klamath Province;

(2) Dispersal habitat between Federal reserves, where Federal lands may not be distributed to prevent isolation of populations, or between non-Federal ownerships where the distance between reserves is not great. Where distances are large, scattered breeding sites may be important to improve connection between populations. Areas that can provide valuable dispersal habitat on non-Federal lands include, in Washington--the western portion of the Olympic Peninsula Province and portions of the Eastern and Western Cascade Provinces; and in California--the Coast and Cascades Provinces and small portions of the Klamath Province; and

(3) Suitable habitat for breeding populations in areas where Federal ownership is limited. In these areas, functioning spotted owl populations are desired to maintain a widely distributed population of owls. Areas where non-Federal owl populations are believed to play an important role in this regard include, in Washington—the western portion of the Olympic Peninsula Province; and, in California--the Coast and Cascades Provinces.

Recent Conservation Programs and Strategies for the Northern Spotted Owl Non-Federal Management Efforts

To varying degrees, the laws, regulations, and policies of California, Oregon, and Washington provide protection and contribute to the conservation of the spotted owl. Each of the three states is a cooperator with the Secretary of the Interior under section 6 of the Act and each State has cooperative agreements with the Service to carry out conservation activities for listed and candidate species of plants and animals. Under these agreements, the States work cooperatively with the Service on endangered and threatened species conservation projects and are eligible for cost-share

grant money from the Service to carry out State-directed species research and conservation activities. Since the spotted owl was Federally listed, Washington, Oregon, and California have recognized the Federal status of the spotted owl and have adopted forest management rules offering various levels of protection for the species. In addition, numerous changes have been made to State forest practices rules in the last few years in response to the needs of declining species like the spotted owl, the marbled murrelet, and various runs of salmon. Relevant authorities and programs existing in the States of Washington and California are also briefly described below.

California

California has adopted the most protective forest management regulations for the spotted owl in the Pacific Northwest. The State has also been in the forefront of efforts to approach forest management from an ecosystem perspective.

Pursuant to the California Forest Practice Act, the California Board of Forestry establishes regulations under Title 14 of the California Code of Regulations governing timber harvest on private and State lands (14 CFR s895, 898, 919, 939). Registered Professional Foresters licensed by the Board must submit Timber Harvest Plans (THP) to the California Department of Forestry and Fire Protection for review and approval. The California Department of Fish and Game is also responsible for reviewing THPs. THPs may be denied on a number of grounds, including potential take of Federally or State listed threatened or endangered species.

Following the Federal listing of the northern spotted owl, the Board of Forestry implemented no-take rules using standards based on biological advice from the Service. These standards include maintenance of over 1,300 acres of suitable owl habitat within 1.3 miles of every spotted owl site center

and 500 acres within 0.7 miles. The rules instituted a special review process for all proposed private timber harvest to ensure that incidental take would not occur. The process encouraged surveys for spotted owls in THP areas according to a Service-endorsed protocol (USFWS 1992). The Board's no-take rules have maintained options for future management by providing protection for habitat around every known spotted owl site center, and have resulted in greatly increased knowledge of the species' numbers and distribution. Other Forest Practice Rules, including riparian buffers and limitations on clear-cut size, may provide additional contributions to the maintenance of spotted owl habitat in northern California. These include the 40-acre limitation on clear-cut size, limits on adjacency of clear-cuts, and protection of riparian buffers.

The Board of Forestry (Board) also recently adopted rules establishing regulatory incentives for large-acreage landowners who develop sustained yield plans (SYPs). The SYP rules may provide considerable benefit to spotted owls, because ownerships operating under these rules must maintain specified portions of each watershed in timber stands of large size classes for several decades, thus providing spotted owl habitat components throughout the landscape.

The Department of Fish and Game and Department of Forestry and Fire Protection jointly maintain an interagency data base of Federal and non-Federal spotted owl locations. The Forest Practice Rules require that all information on spotted owl sites that is generated during timber harvest planning be submitted to this data base, and relevant data are made available to all parties planning timber harvest or other activities. Thus, the data base is a functional tool in protection of the species.

Following the listing of the northern spotted owl, the California Board of Forestry directed the Department of Forestry and Fire Protection to prepare a Habitat Con-

servation Plan (HCP) and section 10(a)(1)(B) incidental take permit application to address all private timber harvest regulated by the Board. Following a three-year planning effort by that Department and a number of cooperators from agencies, industry, and environmental groups, the Board tabled consideration of the draft Habitat Conservation Plan because significant issues remained unresolved, most notably the funding mechanism. The draft plan nevertheless represented a significant cooperative commitment to resolve conservation issues by the State and other concerned parties and many of the biological elements of the draft HCP may have future application.

Washington

The spotted owl is listed under Washington law as an endangered species. The Washington Department of Natural Resources has the responsibility for regulating timber harvest activities on non-Federal lands under the authority of the Washington State Forest Practices Act (76.09 RCW) and its implementing regulations (WAC 222.08-222.50). These regulations are promulgated by the Forest Practices Board.

Recent regulations (WAC 222.16.080(1)(h)) have required forest practices on the 500 acres of suitable habitat surrounding the site center of known spotted owls to be reviewed under the State Environmental Policy Act, WAC 222.16.080(1)(h). In practice, this rule has led landowners to avoid applying for permits for forest practices within the 500-acre area. This regulation expired on February 9, 1994, and has been extended pending approval of a final rule. The Forest Practices Board has established a Scientific Advisory Group to recommend the scientific basis for a new rule to replace the current rule. No other forest practices regulation expressly addresses the protection of spotted owl habitat from timber harvest activities. However, the Department notifies individual landowners when a proposed forest practice occurs within the median annual home range of a known spotted owl

pair or resident single, and advises the landowner to contact the Service. In addition, several other regulations contribute habitat benefiting spotted owls, including regulations requiring riparian zone protection, wetlands protection, and retention of wildlife reserve trees.

Riparian management zone regulations require the minimum retention of 25-foot wide buffers along the sides of fish-bearing streams with a varying ratio of trees to be retained per 1,000 feet of stream within the buffers, based on stream location, width and bottom composition.

Wetland management regulations require the establishment of a zone surrounding non-forested wetlands which varies in width from a minimum of 25 to 50 feet depending on the size and category of the wetland. The regulations also require the retention of a minimum number of trees (75) per acre and that a percentage of those trees meet minimum size classifications (six inches dbh) depending on the type of wetland. Of this total, 25 trees are to be more than 12 inches dbh, and five of them are to be more than 20 inches dbh, where they exist.

Clear-cut size and green-up regulations limit the maximum size of clear-cut harvest units to 120 acres, unless a State environmental Policy Act review is undertaken that could boost the potential size of the harvest to 240 acres. The perimeter of harvest units must meet minimum stand qualifications to maintain age class diversity adjacent to the harvest unit before harvest may proceed.

Wildlife reserve tree regulations require the retention of three snags (minimum of 12 inches dbh), two green recruitment trees (minimum 10 inches dbh), and two down logs (minimum 12 inches diameter at the small end).

Besides regulating forest practices in Washington, the Department of Natural Resources (WDNR) administers approximately five million acres of State lands, 2.1 million acres of which are forested and managed in trust for various

beneficiaries. The WDNR has avoided the take of spotted owls on its lands and has begun preparation of an HCP under section 10(a)(1)(B) of the Act for all State lands in the range of the owl. The WDNR is also developing a conservation strategy for the spotted owl that would be applied to the Congressionally mandated 264,000-acre State Experimental Forest on the Olympic Peninsula.

Apart from these efforts by State government, various private efforts are underway to conserve spotted owls, including the development of, or commitment to, HCPs and "no take" agreements by several major landowners in the State. In addition, the Yakima Indian Nation is developing a conservation strategy for the spotted owl while continuing to follow its previous interim spotted owl strategy and selective timber harvest regime.

Past Federal Management Strategies

Prior to its listing as a threatened species, many different approaches to northern spotted owl management and research were undertaken by Federal and State resource agencies, for example, designation of "spotted owl habitat areas" or "SOHAs." Each of these approaches fulfilled different conservation objectives for the northern spotted owl. The conservation objective of the earliest attempts at spotted owl management, which began in the mid-1970s, was to temporarily protect sites that supported individual pairs of spotted owls. In the 1980s, management strategies were based on conservation objectives that tried to avoid land use conflicts while managing spotted owls and late-successional forest habitat; these management strategies were generally inadequate. A complete discussion of the history and chronology of past spotted owl management attempts can be found in Thomas et al. (1990).

Recent (post-listing) Federal northern spotted owl management strategies have been based on the establishment of a

system of large, dispersed Federal land reserves, with conservation objectives somewhat different from earlier strategies. These management strategies were designed to meet the following conservation objectives—(1) provide habitat to sustain approximately 20 or more breeding pairs of spotted owls on each Federal reserve; (2) decrease the chance of catastrophic loss of populations in reserves; (3) lower the risk of losing spotted owls from a reserve due to a single catastrophic event; and (4) ensure that adequate habitat existed between the reserves for dispersal of owls throughout its range. To fulfill these objectives, these management strategies proposed establishing a reserve network of Federal lands based on blocks of late-successional habitat of sufficient size and proximity to each other to maintain viable populations of the spotted owl throughout its range. Assessments of these strategies have generally recognized that, in certain areas of the northern spotted owl's range, Federal lands are not, by themselves, adequate to support the full recovery of the owl although they could provide a major contribution toward the owl's conservation in other parts of its range (USDI 1992).

To meet their conservation objectives, these management strategies generally established Federal reserves designed to sustain at least 20 pairs of spotted owls where conditions allowed. These strategies assumed that any smaller late-successional Federal reserves should be placed closer together to increase the probability of successful spotted owl dispersal between the reserves. In addition, plans provided dispersal habitat sufficient to support movements between blocks. For this reserve design, successful dispersal would accomplish two objectives—it would help prevent genetic isolation in individual owl populations and it would allow spotted owls to naturally recolonize important areas that have few or no spotted owls present. By allowing spotted owls to

disperse between a series of discrete reserves, this reserve design could maintain a spotted owl population over a large area even if a single reserve was lost to catastrophe.

By way of example, the Interagency Scientific Committee (ISC) developed a conservation strategy based on managing large, well-distributed Federal blocks of suitable spotted owl habitat that were sufficiently connected to maintain a stable and well-distributed population of spotted owls throughout their range (Thomas et al. 1990). The ISC did not integrate non-Federal lands into its conservation strategy. To provide dispersal habitat between these reserves, the ISC recommended a "50-11-40 rule" where 50 percent of Federal forest habitat (based on quarter-townships) would be managed to retain dominant or co-dominant trees with an average of 11 inches dbh and provide a minimum 40 percent canopy closure. Canopy closure refers to the degree to which the crowns (tops) of trees obscure the sky when viewed from below. The "50-11-40" rule was set forth as one method of providing for dispersal habitat on Federal forest lands; other prescriptions have been and can be developed which provide comparable dispersal conditions, e.g., Murray Pacific HCP dispersal prescription.

The Federal Forest Plan

The range of the spotted owl includes approximately 24,518, 000 acres of Federal lands of which 20,577,000 acres are forested. The Forest Plan represents a management strategy for Federal LSOG-forests in the coastal western states of California, Oregon, and Washington that provides habitat to support the persistence of well distributed populations of species that are associated with late-successional forests, including the northern spotted owl.

The Forest Plan established a network of reserves totaling over 11.5 million acres of Federal land in northern California, Oregon, and Washington. That total includes 7.43 million

acres of late-successional reserves, 2.63 million acres of riparian reserves, and 1.48 million acres of administratively withdrawn areas. This acreage is in addition to 7.32 million acres of Congressionally reserved lands.

The late-successional reserves currently provide 3.2 million acres of suitable habitat for the spotted owl. The interim riparian reserve provide an additional 0.74 million acres of suitable habitat and the administratively withdrawn areas provide an additional 0.31 million acres of this habitat.

Late-successional reserves are expected to provide the primary contribution to the recovery of the spotted owl by maintaining large clusters of spotted owls and spotted owl habitat throughout a significant portion of the range of the species. The reserves are expected to increase in value for spotted owl recovery as young forested stands grow into suitable habitat and increase their capacity to support additional numbers of stable spotted owl pairs.

Programmed timber harvest operations are not allowed in late-successional reserves under the Forest Plan. However, carefully controlled thinning activities are allowed in any stand of one of these reserves less than 80 years of age. Salvage operations also would be allowed on these reserves in areas where catastrophic loss exceeded ten acres. In both cases, harvest proposals must be reviewed by an interagency oversight group to ensure sound ecosystem management.

No programmed timber harvest is allowed in riparian reserves under the Forest Plan and Federal agencies are required to minimize the effects of roads, cattle grazing, and mining activities in these areas. These riparian reserves are eventually expected to provide a considerable amount of late-successional forest, because they currently represent approximately 31 percent of the lands that would otherwise be designated as Matrix. Based on current information (USDA et al. 1993), approximately .74 million acres (28 percent) of

the 2.63 million acres in riparian reserves currently provide suitable nesting, roosting, and foraging habitat for spotted owls and 1.42 million (54 percent) of the riparian reserves provide suitable dispersal habitat for spotted owls.

The Forest Plan places 1.5 million acres of Federal land in 10 special "Adaptive Management Areas (AMAs)." Management activities in these AMAs would emphasize innovative forestry techniques with the goal of speeding attainment of late-successional characteristics and on restoring watersheds. These activities are expected to benefit northern spotted owl management in the long- term, but would not be expected to contribute substantially to owl conservation needs in the short-term. Suitable habitat for the northern spotted owl represents approximately 0.37 million acres of the lands that have been designated as AMAs.

Programmed timber harvests also are allowed on approximately four million acres of Federal forests designated as the Matrix under the Forest Plan. The Plan differs from previously proposed strategies in that the 50-11-40 rule does not apply to Matrix areas between late-successional and other Federal forest .reserves. The Plan concluded that the need for spotted owl dispersal habitat could be met with the combination of reserves as proposed, plus additional matrix prescriptions.

In Washington and Oregon, the Plan requires leaving 15 percent of the trees ("green tree retention") in all harvest units on AMAs and matrix areas outside of the Coast Ranges and Bureau of Land Management lands in southern Oregon. The Plan encourages these trees to be left in small clumps with the expectation that they, along with the riparian reserves, would contribute to the creation of dispersal habitat. The Forest Plan adopted this prescription to improve the future condition of these forests. These prescriptions could

ultimately be adjusted as a result of watershed analysis and other planning activities related to the implementation of the Forest Plan.

In California, the Forest Plan incorporates the Matrix prescriptions contained in the draft National Forest land management plans. These prescriptions are designed to maintain dispersal habitat in a variety of timber types.

The FEMAT report (p. IV-43 and p. IV-153) stated that implementation of Option 9 (which served as the basis for the Forest Plan) would result in a projected future likelihood of 83 percent that spotted owl "habitat is of sufficient quality, distribution, and abundance to allow the species population to stabilize in well distributed areas of Federal lands," and a projected future likelihood of only 18 percent that "habitat is of sufficient quality, distribution, and abundance to allow the species population to stabilize, but with some significant gaps in the historic species distribution on Federal land. These gaps cause some limitation in interactions among local populations." Moreover, implementation of Option 9 was rated by FEMAT as resulting in a zero likelihood that "habitat only allows continued species existence in refugia, with strong limitations on interactions among local populations", and a similar zero likelihood that implementation of the option would result in "species extirpation from Federal lands".

These probability judgments reflect the contributions to conservation expected to be provided by the implementation of the Forest Plan on Federal lands. They indicate a high likelihood that, over the long-term, the Forest Plan will provide conditions on Federal lands that would contribute significantly to the conservation and recovery needs of the spotted owl. This assessment is consistent with the Federal policy to provide the predominant protection for spotted owls

on Federal lands and it is within this context that the Service proposes to modify the incidental take prohibitions for certain non-Federal lands.

General Approach Used to Develop This Special Rule

The goal of this proposed rule was to identify non-Federal lands that are no longer either necessary or advisable to the conservation of the spotted owl given the contributions of the Forest Plan the likely possibility of numerous large scale, multi-species Habitat Conservation Plans, and other measures and practices in effect. In reviewing the alternatives identified in the NOI, the Service evaluated the contributions to the conservation of the owl provided by the Forest Plan, past Federal owl conservation strategies, existing State forest practices regulations, tribal conservation and private timber management plans, as well as public comments provided in response to the NOI.

The Service considered various factors in identifying areas of non-Federal land where relief could be provided and other areas where incidental take restrictions should be maintained at this time. The Service first considered the conservation benefits that the Federal Forest Plan provided the owl for a given area. These benefits were then compared and contrasted with the conservation goals for the area originally established under the Final Draft Recovery Plan for the northern spotted owl. The Service focused particularly on Forest Plan impacts affecting the conservation of owl habitat and owl numbers, as well as the size and location of Federal reserves. It then identified certain areas of non-Federal land which were still important for owl conservation and what the conservation goals should be for such areas. The service gave particular care and attention to the non-Federal lands which were noted as important in the Report of the Forest Ecosystem Management Assessment Team (FEMAT), IV 150-151. In identifying boundaries for such areas, the Service considered, among other things, current owl population

status on non-Federal lands, the need for owl population support within adjacent Federal reserves, and the need for connectivity between such reserves. The Service also attempted to exclude wherever possible large areas of non-Federal land with little or no owl habitat.

The Forest Plan is a habitat based conservation strategy that would anchor and secure millions of acres of Federal land across the range of the spotted owl, an unprecedented commitment of Federal resources towards the conservation of the owl. Given that commitment to a habitat based strategy and the scope of the Forest Plan, the Service no longer believes that it is essential to the conservation of the spotted owl to continue to prohibit the incidental take of the owl on all non-Federal land located within the range of the owl. The Service also believes that the combination of Federal and non-Federal habitat based strategies for the spotted owl contained in this proposed rule, the Forest Plan and multi-species Habitat Conservation Plans will, over time, further the conservation of the species and its recovery.

When developing objectives for regulatory relief for non-Federal lands which were consistent with the Forest Plan, the Service evaluated past biological information and has concluded that it is still important to retain the closest 70 acres of suitable owl habitat surrounding site center regardless of whether the center is in an area of proposed relief or not. The Service also believes that the substantial loss of suitable habitat within the estimated median annual home range of an owl is likely to result in inadequate nesting, juvenile development, and adult dispersal and survival, and will significantly increase the likelihood of actual harm to, and incidental take of, an owl.

As the riparian reserve, matrix, adaptive management areas, and late-successional reserve management criteria of the Forest Plan are implemented, along with the requirements of underlying State law and other provisions proposed in this

rule for owl protection, dispersal and connectivity conditions for the species, survival should improve over time throughout its range. For this reason, the Service has chosen not to include in this proposed rule mandatory dispersal prescriptions such as the 50-11-40 rule which was designed originally to generate dispersal habitat conditions for Federal lands only.

For those areas where satisfactory dispersal conditions likely are not present, the Service believes that such conditions can be achieved over time through other means such as full protection against incidental take, large scale Habitat Conservation Planning (HCPs), Local Option Conservation Plans, or voluntary conservation contributions by non-Federal landowners. Recognizing the limitations on Federal authority to mandate the development of dispersal habitat in these areas, this proposed rule would encourage non-Federal landowners to manage their lands in ways that are more consistent with the conservation of the spotted owl. In some areas it would remove the disincentives associated with maintaining suitable spotted owl habitat, and, would bring more certainty to future planning for timber management as well as for owl conservation activities.

Upon consideration of all of the above factors, the following summarizes the provisions of this 4(d) rule:

Regulatory Provisions Common to Both Washington and California

Some protective measures for the owl would be identical for both the State of Washington and California. The prohibition on killing or injuring of spotted owls would not be relieved in any part of the owl's range by this proposed rule. Similarly, timber harvesting of the closest 70 acres of suitable owl habitat surrounding a site center would remain prohibited throughout Washington and California, unless the site has been determined to be abandoned.

In addition, the Service would retain for an additional two years, the prohibition against incidental take as applied to owls which are dependent upon non-Federal lands and whose site centers are located within Federal Forest Plan Reserves or Congressionally reserved or Administratively withdrawn areas which are outside of Special Emphasis Areas or are on the western portion of the Olympic Peninsula in Washington, or are located on Federal Forest Plan reserves or Congressionally reserved or Administratively withdrawn areas within the Klamath Province in California. At the end of this period, the Service will review any new information or data involving the status of such owls and their habitats in the affected areas, including the results of any completed watershed analysis and other planning efforts under the Federal Forest Plan. In particular, the Service would assess on a local area-by-area basis whether the continuation of the incidental take prohibition on affected, adjacent non-Federal lands was still necessary and advisable for achieving the conservation goals of the Forest Plan for that area. The Service would then lift the incidental take restrictions where warranted and require the protection of only the closest 70 acres of suitable habitat surrounding an affected site center.

Relief From Current Incidental Take Provisions in Washington

A total of approximately 10.6 million acres of non-Federal land in the range of the spotted owl in Washington (the Washington Lowlands Province, portions of the Western and Eastern Cascades Provinces and portions of the Olympic Peninsula Province) would be excluded from the boundaries of proposed Special Emphasis Areas (SEAs) and be exempted from the future application of current incidental take restrictions for the northern spotted owl. Of this land base outside SEAs, 8.3 million acres have some sort of forest cover of which 5.24 million acres are in conifer cover.

Actually, only a small percentage of these lands are currently affected by present incidental take prohibitions for owls. Absent this proposed rule, however, much of this remaining land could potentially be affected should a spotted owl relocate to any adjacent suitable owl habitat at some point in the future. Approximately 1.7 million acres of non-Federal lands would be left inside of SEAs. Of this acreage figure, 1.3 million acres of non-Federal land is in conifer forest and would remain subject to the incidental take prohibitions for any owl found present in this area. In fact, only a portion of this acreage inside SEAs is currently affected by the presence of owls. Of the approximately 510,000 acres of non-Federal forestland which are today under incidental take restrictions for known owl sites, no less than 325,000 acres or almost 60 percent would be relieved from such restrictions as a result of this rule.

Of the 140 spotted owl site centers on non-Federal lands in Washington, 84 are in the six proposed SEAs and would retain current incidental take protection. Fifty-six spotted owl site centers are outside SEAs on non-Federal lands and would be released from current incidental take prohibitions. There are an additional 121 site centers on Federal lands within the proposed SEAs, of which 68 may be dependent on non-Federal lands. There are also 83 site centers on Federal lands outside the SEAs that may be dependent on non-Federal lands. Of the 83 site centers outside of SEAs, 71 site centers are located within either a Federal Forest Plan Reserve or a Congressionally reserved or Administratively withdrawn area. The Olympic Peninsula contains 41 of these sites with the remaining 30 sites located outside of SEAs in the rest of the State.

Activities Outside of Designated SEAs

The Service proposes to reduce the current prohibition against the incidental taking of owls for those non-Federal lands which are located outside of SEAs proposed in

Washington. In areas outside of SEAs, a non-Federal landowner would only be required to retain the closest 70 acres of suitable owl habitat surrounding an owl site center. Legal and administrative boundaries were used wherever possible to assist in refining identified SEA boundaries. As noted above, the Service estimates that approximately 10.6 million acres of non-Federal land in Washington lie outside of SEAs, of which 5.24 million acres are forested with conifers. These would be the primary areas receiving relief under this rule for Washington. In these areas, the incidental take of owls would not be prohibited as long as timber harvest activities did not take place within the closest 70 acres of suitable owl habitat immediately surrounding an owl site center.

As noted previously, the above reduction to 70-acres would not be applicable for non-Federal lands affected by any owl site center which is located within a Forest Plan reserve or Congressionally reserved or Administratively withdrawn area which is outside of an SEA. The Service intends to reassess the importance of these sites within the next two years as additional data and planning information is developed under the Forest Plan. The one region in Washington where this two-year retention of prohibitions would not be applied outside of an SEA would be on portions of the Olympic Peninsula. On the northern, eastern, and southern parts of the Peninsula, non-Federal landowners would only be required to preserve the closest 70 acres of suitable habitat surrounding a site center regardless of whether the site center is located within a Federal reserve or withdrawn area. The Service believes that the recent Reanalysis Team Report for the Olympic Peninsula (Holthausen, et al., 1994) addresses the issue of the contribution that such non-Federal areas provide toward achieving the goal of recovery of the owls on the Peninsula. Under these circumstances, the Service does not

believe that it is essential that existing incidental take restrictions be retained for an additional two years for these three areas on the Peninsula.

Designation of Special Emphasis Areas

The six areas discussed below (Figure 5 to § 17.41(c)) would be designated as SEAs within Washington:

(a) Columbia River Gorge/White Salmon (Figure 6 to § 17.41(c)).

The Columbia River Gorge portion of this SEA is in the southern portion of the Washington Cascades province, north of the Columbia River and west of the Cascade crest. Non-Federal lands link owls and owl habitat between Federal reserves in the Washington Cascades and Oregon Cascades along the Columbia River Gorge, thereby contributing to the objectives of the Forest Plan.

The White Salmon portion of this SEA is bordered by the Yakima Indian Reservation to the northeast, Federal lands and the Cascade crest to the west and the Columbia River to the south. The White Salmon area was not included within the "Proposed Action" for the December 29, 1993, NOI (58 FR 69132), but was included within "Alternative C" of that NOI. As a result of public comments received in response to the NOI, however, and recent analysis of spotted owl habitat in Washington (Hanson, et al. 1993), the Service has concluded that the inclusion of the White Salmon area as part of this SEA is warranted. These non-Federal lands are an important link to the owl population found on the Yakima Indian Reservation to owl populations in Federal reserves to the southwest. This portion of the SEA would provide a route around high-elevation terrain on Federal lands, through lower-elevation forests on non-Federal lands to provide that needed link. It also widens the zone of protection for the Cascades along the Columbia River.

This combined SEA contains 37,000 acres of Federal land and 262,000 acres of non-Federal lands. Sixteen owl site centers are on non-Federal lands and 3 site centers are on Federal land within this SEA, with one site activity center on Federal lands which relies to some degree upon adjacent non-Federal lands. The conservation goals for this combined SEA are to maintain connections between provinces and the owl population on the Yakima Indian Reservation, and to provide demographic support to the owl population in the Federal reserves.

(b) Siouxon Creek (Figure 7 to s17.41(c)).

This SEA is located along Swift Creek Reservoir and the Upper Lewis River, south of the Mt. St. Helens National Monument. As with the White Salmon SEA, this area was not included within the "Proposed Action" for the December 29, 1993, NOI (58 FR 69132), but was included within "Alternative C" of the NOI. Because of the public comments received in response to the NOI and further analysis of spotted owl habitat in Washington (Hanson, et al. 1993), the Service has determined that the inclusion of the Siouxon Creek SEA in the 4(d) Rule is warranted. This SEA contains seven owl site centers, five on non-Federal land and two on Federal land, and includes approximately 44,000 acres of non-Federal land and 1,000 acres of Federal land. Owls on these non-Federal lands are needed to supply demographic support to owl populations on adjacent Federal reserves and dispersal habitat is needed to provide connectivity through the Lewis River Valley between the reserves.

(c) Mineral Block (Figure 8 to s17.41(c)).

This SEA surrounds a block of Federal land (Mineral Block) that has been designated as a Federal reserve under the Forest Plan. The Mineral Block is about 12 miles west of the main part of the Gifford Pinchot National Forest. It is too small to support a population of 20 owl pairs. Owl site

centers on adjacent non-Federal lands would support this population and to provide a link to the Gifford Pinchot National Forest.

This SEA contains 39,000 acres of Federal land and 259,000 acres of non-Federal lands. Twelve owl site centers are on non-Federal lands in the SEA; 17 centers are located on Federal lands of which five rely to some degree upon adjacent non-Federal lands. The conservation goals for this SEA are to provide demographic support for the owl population in the Federal reserve.

(d) I-90 Corridor (Figure 9 to § 17.41(c)).

This SEA is north and south of Interstate-90 (I-90) between North Bend and Ellensburg, Washington. This area is in checkerboard, intermingled Federal and non-Federal ownership, a portion of which is included in the Snoqualmie Pass AMA under the Forest Plan. This general area has been repeatedly identified as being important to the conservation of the owl to maintain a connectivity link between the northern and southern portions of the Washington Cascades (Thomas et al. 1990 and Hanson et al. 1993). Existing habitat for spotted owls is locally sparse and highly fragmented.

Non-Federal lands in this SEA would support the efforts of the Forest Plan by providing dispersal habitat (and some nesting, roosting and foraging habitat) for owl populations that are on the north and south sides of I-90, and between Federal reserves and the AMA. Owls that are on non-Federal land would provide valuable demographic support of owl populations in adjacent Federal reserves that are low in numbers. Federal reserves that are in checkerboard ownership are also in need of demographic support for owls because of their fragmented ownership pattern and degraded habitat conditions.

This SEA contains 383,000 acres of Federal land and 400,000 acres of non-Federal lands. Twenty-nine owl site

centers are on non-Federal lands in this SEA; 78 site centers are located on Federal lands of which 53 rely to some degree upon adjacent non-Federal lands. Conservation goals for this SEA include demographic support for adjacent late-successional reserves and connectivity between reserves. Changes to the eastern boundaries of this SEA from the NOI in this proposal were made to better promote dispersal success of owls located within the eastern portion of this SEA.

(e) Finney Block (Figure 10 to s17.41(c)).

This SEA includes the non-Federal lands that surround the Finney Block AMA on the Mt. Baker-Snoqualmie National Forest. This SEA would link owl populations in Federal reserves with the owl population in the AMA. Owls located on non-Federal lands in this SEA also would bolster the owl populations in the Federal reserves and the AMA. These actions would supplement the Federal efforts under the Forest Plan by contributing to the stabilization of owl populations within this portion of the species range.

This SEA contains 196,000 acres of Federal land and 266,000 acres of non-Federal lands. Two owl site centers are on non-Federal land in this SEA; 21 centers are located on Federal lands of which seven rely to some degree upon adjacent non-Federal lands. Conservation goals for this SEA include demographic support for the AMA and Federal reserves and connectivity between Federal reserves.

(f) Hoh/Clearwater (Olympic Peninsula) (Figure 11 to § 17.41(c)).

Upon consideration of a recent reanalysis of owl persistence on the Olympic Peninsula (Holthausen et al. 1994) and other data and information, the Service has decided to alter its approach to the Olympic Peninsula from that set out in the NOI in December of 1993: The Service now proposes to significantly scale back the size of the SEA for the

Peninsula and to relieve incidental take restrictions for spotted owls for the remainder of the Peninsula. Of the Federal lands on the Olympic Peninsula, only 8,400 acres of suitable owl habitat are available for timber harvest under the Federal Forest Plan.

There has been long standing concern about the viability and persistence of spotted owls on the Olympic Peninsula. A recent reanalysis of the contribution of Federal and non-Federal habitat to persistence of the northern spotted owl on the Olympic Peninsula (Holthausen *et al.* 1994) concluded that there were 155 known owl pairs on the Olympic Peninsula and estimated a total population of between 282 and 321 pairs. These estimates are substantially higher than earlier reported estimates.

The Hoh/Clearwater SEA encompassing the western portion of the Peninsula contains about 1,000 acres of Federal lands and 471,000 acres of non-Federal lands. Twenty owl site centers are located on non-Federal lands in this SEA. Conservation goals for this SEA are to maintain demographic support for Federal reserves, maintain a well-distributed population, and provide connectivity within the province and between late-successional reserves. Changes in this SEA from the NOI were made to support the Federal effort in this province by drawing upon the resources of the remaining non-Federal concentration of owls and owl habitat on the western side of the Peninsula. The reanalysis report assessed the relative value of the Hoh/Clearwater SEA boundaries as proposed by the Service and did not compare or contrast alternative SEA boundary configurations for the western side of the Peninsula.

Although recommendations were included in recent reports (USDI 1992, Hanson et al. 1993, Buchanan *et al.* 1994) to retain incidental take restrictions on non-Federal lands in southwestern Washington, the Service believes that current non-Federal conservation planning activities (e.g., multi-

species HCPs and no-take plans), new analyses (Holthausen et al. 1994), and other relevant factors support the decision not to propose southwestern Washington as an SEA. The Service reached this conclusion on Southwest Washington for a variety of reasons. First, while Southwest Washington constitutes an important part of the historic range of the spotted owl, there presently are only a small number of isolated owl pairs or resident singles across a vast expanse of marginal owl habitat. The inclusion of this area in an SEA would briefly protect home range areas for the few owls in the area, but once those owls die or move away, the protection for their home range areas would fade away as well, resulting in the eventual harvest of the areas. Moreover, while Southwest Washington previously had been assigned an important conservation function for providing connectivity with the isolated population of owls on the Olympic Peninsula in the Final Draft Spotted Owl Recovery Plan, recent reanalysis by Holthausen et al. indicates that the feasibility of the area ever serving this connectivity function, especially through application of incidental take prohibitions, is very low.

Apart from considerations involving the Olympic Peninsula, the limited number of owls in southwest Washington and lack of present suitable habitat provide further support to the Service's decision to take an innovative approach to owl conservation in this area. While the Service might be able to prevent someone from destroying certain areas of existing suitable owl habitat where an owl is present, the Act cannot be used to force people to restore or enhance owl habitat that has already been destroyed or degraded. Thus, most landowners in Southwest Washington have little to no incentive at present to develop habitat that is attractive to owls.

The acquisition of sufficient non-Federal land in Southwest Washington to establish a network of owl conservation reserves is not a feasible alternative either. The Final Draft

Recovery Plan for the Spotted Owl estimated that the cost of such a reserve network could range from $200 million to $2 billion. Thus, neither land acquisition nor traditional enforcement policies are feasible catalysts for owl conservation in an area such as this which has limited suitable owl habitat.

Recognizing the historic role that Southwest Washington played within the range of the owl, the Service is attempting to address these problems by aggressively moving forward with the development of multi-species Habitat Conservation Plans with several of the large landowners in this province. In addition, one of the landowners has entered into a "take avoidance" agreement covering 100,000 acres while working on their HCP. The agreement ensures that no owls will be taken as the result of timber harvest during the period in which the HCP is being developed. Thus, innovative approaches towards conservation provide the only realistic hope for facilitating long-term owl use and dispersal within Southwestern Washington.

Retention of Incidental Take Restrictions for Activities Inside of SEAs

Subject to certain specified exceptions, the service generally would retain existing incidental take protection for owls located within SEAs. The Service also would retain full incidental take protection for any owl whose site center is located within and along the boundary of an SEA and is dependent upon adjacent non-Federal lands located outside of the SEA to avoid harm. Thus, there are two categories of non-Federal lands which could remain subject to existing incidental take restrictions for an owl whose site center is located within the boundary of an SEA--those adjacent non-Federal lands located inside an SEA and those adjacent lands located outside of an SEA boundary but which are still necessary to provide sufficient suitable owl habitat so as to avoid the incidental take of an owl.

One modification that the Service proposes to make to existing incidental take restrictions within SEAs would involve non-Federal lands surrounded by or located in matrix and AMA areas designated under the Federal Forest Plan. The Service proposes to authorize such affected non-Federal landowners involved in harvest activities to apply either the final management prescriptions delineated for the surrounding Federal Matrix/AMA land, as determined through the watershed analysis or AMA planning processes, as appropriate, or such management practices which comply with the current incidental take restrictions.

Application of either management strategy would absolve the affected non-Federal landowner from any liability for incidental take of an owl under the Act. This would result in the application of more uniform owl conservation standards within a matrix or AMA area regardless of land ownership.

The one exception to this policy would be where the adoption of matrix or AMA prescriptions could result in the incidental take of an owl whose site center is located within a Forest Plan reserve or Congressionally reserved or Administratively withdrawn area. As would be the case for similar site centers outside of SEAs, the incidental take restrictions would continue to apply for at least two more years for site centers within reserve or withdrawn areas. At the end of this period, the Service will review any new data or information involving the status of such owls and their habitats in the affected areas, including the results of any completed watershed analysis and other planning efforts under the Forest Plan. As noted previously in a discussion of this review process, the Service would assess on an area-by-area basis whether the continuation of the incidental take prohibition on affected non-Federal lands was still necessary and advisable for achieving the conservation goals of the Forest Plan. The Service would lift the incidental take restrictions where warranted and authorize the adoption of the final matrix or

AMA prescriptions, at the discretion of the affected non-Federal landowner, as a means of avoiding an unauthorized incidental take of an owl.

One limited exception that the Service proposes to make to current incidental take restrictions within SEAs would involve small landowners. Except for the closest 70 acres of suitable habitat around owl site centers themselves, the Service proposes to relieve incidental take restrictions for small landowners who own, as of the date of this proposed rulemaking, no more than 80 acres of forestlands in a given SEA in Washington. The Service would also extend this proposal to small landowners who are outside of, but adjacent to, an SEA and whose lands are affected by the incidental take restrictions for an owl whose site center is located within the SEA. For these landowners, the maximum ownership figure of 80 acres would be calculated based upon the amount of land they owned inside an SEA and the amount of land outside the boundary of an SEA which was affected by current incidental take restrictions for an owl inside an SEA.

The 80-acre figure for small landowners was selected after an analysis of land ownership patterns and an accounting for the size and location of lands covered by the Forest Plan, State forestlands, industrial forestlands, and known large ownerships of non-industrial forestlands. The Service also considered the fact that past Forest Service studies have shown that only a very small fraction of small landowners own forested lands for the exclusive purpose of economic return from commercial harvest. In addition, most small landowners utilize selective harvest techniques or small clear cuts which would generate only very minor and incremental effects on any particular owl. Despite their normal practices, however, the small landowners of the Northwest have resorted to "panic cutting" over their fear of Federal restrictions to protect owls. It is this category of landowner, in

particular, who needs to be provided sufficient assurances of relief so they revert back to their past practices of low impact forestry.

Based on this analysis, the Service concluded that relief from the incidental take prohibition for owls for landowners with less than 80 acres of forestland within, or adjacent to, SEAs would have a deminimis impact upon owl conservation across the State. Moreover, given various technology limitations and the potential causation and burden of proof problems associated with proving incidental take to an owl from small scale land use activities of any one particular small landowner, the Service believes that there is a better allocation of its limited law enforcement resources than to attempt to enforce incidental take restrictions on someone owning 80 acres or less of forest land. The Service also proposes a "Local Option Conservation Plan" or Local Option approach to provide small and mid-sized landowners with additional flexibility in dealing with incidental take restrictions.

The prohibition against incidental take in SEAs indirectly assists in maintaining pockets of suitable and dispersal habitat through the continued protection of suitable owl habitat around site centers. This prohibition also helps provide future stocks of juvenile spotted owls who would be more likely to migrate between key reserves. Since a primary need in many of these connectors is the development and maintenance of spotted owl dispersal habitat, the Service acknowledges that alternative means may be developed for achieving that objective. The use of the general incidental take prohibition in SEAs in Washington is valuable when dealing with a wide-ranging species like the northern spotted owl. Nevertheless, the Service recognizes the value in providing flexibility in a section 4(d) rule to allow for the modification of such prohibitions to better reflect local ecological conditions for a given area. Furthermore, in focusing on a single species

objective in Special Emphasis Areas, broader landscape, watershed, or ecosystem conservation possibilities may be foreclosed. One of the key lessons the Service has learned in dealing with northern spotted owl issues over the years is that the variability of habitats and silvicultural practices is such that there might be more than one approach for providing conservation benefits to the owl. For that reason, this rule proposes to establish a Local Conservation Planning Option.

The "Local Option" process would be limited to non-Federal landowners who own, as of the date of this proposed rulemaking, between 80 and 5,000 acres of forestlands in an SEA in Washington. This process could result in the authorization for the incidental take of an owl in exchange for an agreement to grow or maintain dispersal habitat. The local option conservation planning process would not apply, however, to those particular areas within a given SEA where the continued maintenance of suitable owl habitat on non-Federal lands is determined to be necessary and advisable in order to provide demographic support for adjacent Federal owl reserves.

There is no official acreage designation defining a large acreage landowner that is common to the three States of Washington, Oregon and California. Definitions of small, medium and large land ownerships vary and more often differentiate between non-industrial or non-commercial private landowners. For purposes of various State regulatory analyses, taxation or economic policies, and Association memberships, e.g. Washington Farm Forestry Association, acreages ranging from 2,000 to 10,000 acres have been used to differentiate between industrial and non-industrial landowners. For example, 5,000 acres is generally the for adjacent Federal owl reserves.

There is no official acreage designation defining a large acreage landowner that is common to the three States of Washington, Oregon and California. Definitions of small,

medium and large land ownerships vary and more often differentiate between non-industrial or non-commercial private landowners. For purposes of various State regulatory analyses, taxation or economic policies, and Association memberships, e.g. Washington Farm Forestry Association, acreages ranging from 2,000 to 10,000 acres have been used to differentiate between industrial and non-industrial landowners. For example, 5,000 acres is generally the maximum acreage break-off point in Oregon to distinguish a non-industrial forestland owner from an industrial one. Contracts with a mill will also qualify landowners as industrial. Given the range of acreage figures that has been utilized among the three States, the Service believes that a 5,000 acre break point is reasonable for purposes of this 4(d) rule. Accordingly, landowners with less than 80 acres of forestland within an SEA have been treated as small landowners within this rule and have been provided specific relief up front. Landowners with overall forestland holdings greater than 80 acres and not more than 5,000 acres within an SEA are considered to be medium sized landowners and may pursue the "Local option" process to seek greater flexibility in addressing prohibitions an incidental take. Finally, non-Federal landowners who have 5,000 or more acres of forestlands within an SEA in Washington would only receive relief from incidental take prohibitions for the spotted owl by completing an HCP and obtaining a permit under Section 10(a)(1)(B) of the Act.

The landowner-initiated Local Option process must still provide for the primary spotted owl conservation objective specified for the Special Emphasis Area where the property is located. The Service encourages individual and adjacent

multiple landowners to take advantage of this option cooperatively to achieve broader ecosystem conservation objectives which could have these benefits:

—multiple landowners could collaborate to provide greater management flexibility, more effective conservation benefits, and to minimize administrative costs;

—multiple species and habitats could be considered, potentially reducing the need to list declining species or anticipating requirements of future listings;

—land management treatments could become more consistent from Federal to non-Federal lands, particularly in checkerboard areas; and

—landowners could exercise additional flexibility to plan their forestry operations so as to best reflect localized environmental conditions within a Special Emphasis Area.

This proposed rule would provide non-Federal landowners in Washington, in cooperation with the appropriate State agencies, the option of developing cooperative local conservation plans for timber harvests in areas of up to 5,000 acres within SEAs where the incidental take prohibition for the northern spotted owl would not be relieved by this proposed rule. These cooperative plans could provide non-Federal landowners with the opportunity to develop alternative management strategies or prescriptions for addressing the conservation needs of the owl.

The Local Option Conservation Planning process is designed to encourage creative approaches to the conservation of the spotted owl by building flexibility into the regulatory process. Such efforts encourage coordinated management of listed species, like the northern spotted owl and the marbled murrelet. If a Local Option Plan is approved by the Service in consultation with the appropriate State wildlife agency, the

prohibition against take of northern spotted owls incidental to timber harvests may be modified, to some degree, as specified in the Plan. The Service will review each proposed Local Option Plan cooperatively with the affected State wildlife agency to ensure that the conservation objectives for the owl in the affected area will not be precluded and that the proposal is complementary to the Federal Forest Plan.

Under the local option process of this proposed rule, the primary focus would be on the spotted owl, although there might be opportunities for conserving other associated plant and animal species. Approval of a local option conservation plan would be an expedited process (compared to the HCP permit mechanism) through incorporation of specific conservation criteria and guidance provided by this proposed rule.

A non-Federal landowner or local or State government may submit an application to the Service for approval of a proposed local option plan. If requested, the Service would provide further guidance for the development of a local option plan for a particular area. However, the applicant is responsible ultimately for the preparation of a local option plan proposal. The Service will be responsible for ensuring the plan's compliance with the National Environmental Policy Act. Appropriate State of Washington agencies may elect to participate with the Service in the review of local option plan proposals for areas within the State. In addition, if the State's regulations are consistent with this rule, a local option plan proposal could be certified through a State review process.

In determining the criteria for approval of a local option plan, the Service has considered the information and approval requirements set forth at 50 CFR 17.32(b) for a section 10 HCP permit. Those requirements have been further streamlined for local option planning and have been tailored to meet the specific conservation needs of the spotted owl.

Service approval of a local option conservation plan will be based on consideration of the information required to be submitted with an application for approval of a plan. Applications for approval of a local option conservation plan must be submitted to the Field Supervisor of the Fish and Wildlife Service office in Olympia, Washington.

One additional proposed provision affecting timber harvest activities within an SEA involves the recognition and establishment of a "safe harbor" from owl incidental take liability where more than 40 percent suitable habitat remains, post-harvest, within an owl's median annual home range. Although some studies have suggested that rates of owl reproduction and survival may be affected to some degree at a percent of suitable habitat above 40 percent, the benefits of timber management certainty and the problem of enforcement difficulties tied to issues of causation nevertheless warrant a "safe harbor" approach. Thus, in those instances where more than 40 percent suitable owl habitat remains within an owl's median annual home range after harvest, a landowner would not be liable for prosecution should the incidental take of an owl nevertheless occur despite their best efforts to avoid take.

Relief From Current Incidental Take Provisions in California

This proposed rule contains a shift in approach for California which has evolved since the publication of the NOI in December of 1993. The December 29, 1993, NOI did not specify any particular area in California where incidental take prohibitions would be relaxed, but instead stated the Service's intent to defer to California law to provide for the conservation of the spotted owl. In anticipation of that possibility, the California Board of Forestry considered a May 1994 proposal from the California Resources Agency that would have required maintenance of suitable owl habitat as a portion of every watershed. The timber industry

regarded the proposal as too restrictive, and regulatory agencies believed it would be too expensive to administer, so, the Board of Forestry tabled the proposal.

To provide a possible resolution of this impasse, the Service proposes a new structure in this proposed rule as it applies to California which is consistent with the Service's original underlying biological assumptions for the owl in that State, as set forth in the December 29, 1993, NOI. The service proposes to provide some immediate relief from incidental take in most of the California Klamath Province and for small landowners in the remainder of northern California within the range of the northern spotted owl. To encourage additional comprehensive conservation planning for the spotted owl and other species which is available under the California Natural Communities Conservation Planning program (NCCP), additional relief for four other areas of northern California (the California Cascades, Coastal, Hardwood, and Wells Mountain-Bully Choop Regions) (Figure 1 to s17.41(c)) would be available contingent upon the successful completion of a NCCP initiative for spotted owls which is complementary to, or not consistent with the owl conservation goals of the Federal Forest Plan as applied in that State. The actual scope and extent of relief for these four areas would be one of the primary issues to be addressed through the NCCP process. These four areas are called potential "California Conservation Planning Areas" (CCPAs) for purposes of this proposed rule.

Relief From Current Incidental Take Restrictions Inside The Klamath Province Relief Area

The proposed rule would result in a reduction of the prohibition against incidental taking of owls for non-Federal lands within most of the Klamath Province in a zone called the Klamath Province Relief Area (Figure 1 to § 17.41(c)). There are 105 spotted owl site centers located on non-Federal land within the Klamath Province Relief Center. An

additional 117 site centers are on Federal land within the Relief Area which are dependent to some degree upon adjacent non-Federal lands. Within the area of relief, a landowner would only be required to retain the closest 70 acres of suitable owl habitat surrounding a site center. Thus, the incidental take of the spotted owl would not be prohibited for timber harvest activities outside those 70 acres. Such relief would not be provided throughout the entire Klamath Province however. In particular, it would not be provided in those areas that overlap with the boundaries of potential CCPAs, including the Wells Mountain-Bully Choop and the Hardwood Region Areas of the Klamath Province (Figure 1 to § 17.41(c)). Relief would also not be provided for those owls in the Klamath Province Relief Area whose site centers are located on Federal Forest Plan reserves or Congressionally reserved or Administratively withdrawn areas and are dependent upon adjacent non-Federal lands. As noted previously in a discussion of similar site centers in the State of Washington, the Service will reassess the need for such continued protection over the next two years and will provide additional relief where warranted at the end of this assessment.

The California Cascades, Coastal, Hardwood Region and Wells Mountain-Bully Choop CCPAs

California's NCCP program (California Fish and Game Code 2800 *et seq.*) was initiated in 1991 to develop plans that would preserve biological diversity and reconcile development and wildlife needs on a local and regional level. It is designed to encourage public/private sector cooperation, maintain local control over land use decisions, and meet the objectives of State and Federal laws by preserving species and ecosystems before they are on the verge of extinction. Planning criteria and conservation strategies for certain species and communities are developed by scientific review panels.

The California Resources Agency has indicated a willingness to consider initiating an NCCP process for portions of the range of the spotted owl. The Service would encourage the California Resources Agency to convene key stakeholders and regulatory agencies in an NCCP process for the California Cascades, Coastal, Hardwood and Wells Mountain-Bully Choop areas of the State (Figures 2 and 3 to s17.41(c)). The Service recognizes that the actual designation of any CCPA is a discretionary administrative matter controlled by the California Resources Agency. Accordingly, this proposed rule would recognize these four regions as potential CCPA areas, serving as a "place holder" in the 4(d) rule until such time as an NCCP planning process is undertaken and completed. One goal of such a planning effort would be to facilitate and encourage the development of ownership-wide or Region-wide management plans and criteria which adequately provide for the conservation needs of the owl and which complement the owl conservation goals of the Federal Forest Plan. The actual content and scope of such plans would be developed through the NCCP process itself. Ultimately, the planning process must address, to the satisfaction of the State regulatory agencies and the Service, an appropriate balance between providing some measure of regulatory relief while achieving or maintaining the conservation goals for the spotted owl for a particular region.

Under the NCCP approach, the incidental take of the spotted owl would not be prohibited under the Act if take were the result of activities conducted according to an approved CCPA plan. This would require the Service to first determine, in consultation with the California Departments of Fish and Game and Forestry and Fire Protection, that the plan meets the overall requirements of the Act and the conservation goals for the owl in that area and is complementary to the Federal Forest Plan. The process should also consider the extent to which new Board of Forestry Sustained Yield Plans (SYPs) could be used as a basis for incidental take

authorization, provided that such SYPs had been reviewed and approved by the Service after consultation with appropriate State agencies. A joint State and Federal National Environmental Policy Act/California Environmental Quality Act (NEPA)/(CEQA) document could be prepared to review the environmental effects of each CCPA plan, including any incidental take of owls.

Potential CCPA boundaries described below were derived from earlier planning efforts by the State (CDF 1992) and knowledge of current Federal conservation efforts. To the extent that the boundaries of these potential CCPAs are somewhat different from traditional past descriptions of spotted owl provinces in California, they merely represent sub-units of owl provinces.

The areas discussed below could be designated as CCPAs under the California NCCP Act for purposes of northern spotted owl or possible multi-species conservation planning. Of the 837 spotted owl site centers on non-Federal lands in California, 732 are in the combined, proposed CCPAs. There are an additional 228 site centers on Federal lands within the proposed CCPAs, of which 87 rely to some degree upon adjacent non-Federal lands.

(a) Coastal Area (Figure 2 to s17.41(c)).

Extending from the Oregon border south to San Francisco Bay, this area is west of the Six Rivers and Mendocino National Forests. It consists of approximately 293,000 acres of Federal land, and 3.6 million acres of non-Federal land. Timber management is the primary land use on about 2 million acres and is concentrated in the heavily forested redwood zone within 20 miles of the Pacific Ocean coastline. In the more inland and southerly portions of the area, spotted owl habitat is largely confined to the lower portions of drainages and is naturally fragmented by grasslands, hardwoods, and chaparral.

The coastal area of northern California plays an important role in the conservation of the species. It represents more than 10 percent of the range of the spotted owl and has substantial owl populations in managed forests. Approximately 642 owl site centers located on non-Federal lands are known in this area, virtually all of them are in managed second-growth timber stands; 66 site centers are located on Federal lands of which 30 rely to some degree upon adjacent non-Federal lands.

Due to the owl's widespread distribution, the predominance of selective harvest methods, and the rapid regrowth of habitat, the degree of threat to the species in much of this area appears to be relatively low. According to analyses conducted by the California Resources Agency (Berbach *et al.* 1993), more than 75 percent of the quarter-townships in the three northern coastal counties (Del Norte, Humboldt, and Mendocino) meet or exceed the standard for spotted owl dispersal habitat described by the ISC (Thomas *et al.* 1990). Some degree of incidental take could be accommodated while maintaining a well-distributed spotted owl population. The magnitude of such incidental take, however, would be one of the items to be addressed through the NCCP process.

Because Federal lands are limited, they play a small role in the conservation of the species in the California Coastal area. The Forest Plan has placed most of the existing late-successional forests in the BLM's scattered parcels (a few thousand acres) into reserves, and Redwood National Park also provides late-successional habitat in the northern portion of this area. However, these limited Federal reserves cannot support enough spotted owls to provide for the conservation of the species in the coastal province. Therefore, non-Federal lands are generally very important to the conservation of the spotted owl.

Significant non-Federal conservation efforts are already in place or under development in the California Coastal area.

Several timber companies have made substantial investments in information-gathering and planning for owl conservation. The Simpson Timber Company has completed an HCP (Simpson 1992) and received a permit for incidental take of a limited number of spotted owls on its 380,000-acre property. Pursuant to the HCP, Simpson Timber has set aside 40,000 acres for at least 10 years, is conducting research on habitat characteristics, and has banded more than 600 owls. The Pacific Lumber Company is conducting banding and radio-telemetry studies, and has completed a management plan for its 200,000-acre property that maintains owl habitat in every watershed and protects all spotted owl nest sites from take. The Georgia-Pacific and Louisiana-Pacific Corporations have conducted banding and radio-telemetry studies in cooperation with the CDFG; analyses of these data are under way. Numerous smaller-acreage landowners have conducted surveys and provided data to the State's spotted owl database.

Planning a conservation strategy for spotted owls in the California Coastal area is a complex task due to the large number of landowners (conservatively estimated at 30,000 to 50,000 (CDF 1992). Therefore, except for a small landowner exemption for people owning less than 80 acres of forestland within a given CCPA and an additional adjustment for non-Federal lands within matrix and AMA areas, the Service is not proposing to remove the prohibition of incidental take for this area at this time, but will cooperate in anticipated efforts by the California Resources Agency to utilize the NCCP process to further refine an acceptable owl conservation program for this area that addresses the question of additional relief.

(b) Hardwood Region (Figure 2 to § 17.41(c)).

In the southern portion of the California Coast Province and the California Klamath Province, suitable habitat is scattered due to effects of climate, soils, and human development. This area, which includes much of Lake,

Sonoma, Napa, and Marin Counties is dominated by hardwoods and was designated as the Hardwoods Subprovince during the California HCP planning effort (CDF 1992). It consists of approximately 755,000 acres of Federal land and 2.0 million acres of non-Federal land. Approximately 57 owl site centers located on non-Federal lands are known in this area; 70 site centers are located on Federal land of which 9 rely to some degree upon non-Federal lands. In this area, spotted owls are widely scattered and often isolated in small patches of habitat. Because the area contains minimal Federal land, maintenance of the species' current range would depend almost entirely on providing for owls on non-Federal lands.

(c) Wells Mountains--Bully Choop (Figure 3 to § 17.41(c)).

This area is in eastern Trinity County south of the Salmon-Trinity Alps Wilderness, and, as identified in the draft Recovery Plan, provides an important link between the California Klamath Province and the California Cascades Province. This area consists of approximately 116,000 acres of Federal land and 176,000 acres of non-Federal lands, and is managed under Sierra-Pacific Industries' no-take owl management plan. Approximately 13 owl site centers located on non-Federal lands are known in this area; 7 site centers are located on Federal lands of which all 7 rely to some degree upon adjacent non-Federal lands. Conservation goals include maintenance of owl populations and dispersal habitat.

(d) California Cascades (Figure 3 to § 17.41(c)).

The California Cascades Province is east of the California Klamath Province. It consists of approximately 1.3 million acres of Federal land and 1.6 million acres of non-Federal land. Checkerboard Federal/non-Federal ownership patterns predominate. Due to the relatively dry climate and the history of recurrent wildfires in this province, spotted owl

habitat is naturally fragmented by chaparral and stands of deciduous hardwoods. In portions of the province, exclusion of fire during the last century may have encouraged development of mixed-conifer habitat suitable for spotted owls. However, during the same period, timber harvest has removed substantial amounts of suitable habitat. Approximately 105 widely scattered site centers are known. Of these sites, 20 are centered on non-Federal lands and 85 are centered on Federal lands, of which 46 rely to some degree upon adjacent non-Federal lands. The potential for dispersal throughout the province appears to be limited. This province provides the demographic and genetic link between the northern spotted owl and the California spotted owl (Strix occidentalis occidentalis) of the Sierra Nevada range.

Currently, threats in this province include low population numbers, the difficulty in providing for interacting population clusters, and fragmented dispersal habitat. Catastrophic wildfire is a significant threat to habitat. In 1992, a 70,000-acre fire in Shasta County substantially reduced the likelihood of contact between the northern spotted owl and the California spotted owl for the next several decades.

Due to the existing habitat condition and the importance of the province in linking the two subspecies, the entire province has been designated as an area of concern by every spotted owl management plan to date. The Forest Plan provides protection of habitat in the home range of each northern spotted owl found in the province. The province contains the 172,000-acre Goosenest AMA on the Klamath National Forest. Sierra-Pacific Industries' owl management plan covers the majority of the extensive non-Federal checkerboard ownership in the province. The primary conservation needs for both Federal and non-Federal lands are research on habitat use by nesting and dispersing spotted owls, and providing habitat for a well-distributed population and dispersal throughout the province. Because of the poor

biological status of the owl in this province, the opportunity for large scale relief in this area is very limited at present. Should additional data or information suggest that the status of the owl has stabilized or is improving, options for this Province would be reconsidered.

Other Related Provisions

As is the case in the State of Washington, the proposed rule would also include a "safe harbor" for any timber harvest activity where more than 40 percent suitable habitat remained, post harvest, within an owl's median annual home range. This provision would be relevant for harvest activities within the four potential CCPAs.

The Service proposes to provide immediate relief upon the effective date of the final rule from owl incidental take restrictions for small landowners in California. Such relief would be independent of, and in advance of any Natural Community Conservation Planning (NCCP) process. Except within the 70-acre owl activity centers themselves, the Service proposes to relieve small landowners who own no more than 80 acres of forestland in a given CCPA as of the date of publishing this proposed rule in the Federal Register, from the prohibition against the incidental take of owls. The 80 acres/small landowner relief provision would remain in effect regardless of whether an NCCP process was ultimately successful in a given CCPA. The relief provision would be applicable in all four potential CCPAs. It would be unnecessary in the Klamath Province Relief Area, which is the subject of a broader proposal to relax incidental take restrictions.

The Service also proposes to modify existing incidental take restrictions within potential CCPAs that would involve non-Federal lands located amid matrix or Adoptive Management Areas (AMA) designated under the Federal Forest Plan. Where such non-Federal lands are subject to incidental take

prohibitions for a given owl, the Service proposes to authorize the affected non-Federal landowners to apply either the final management prescriptions for the surrounding Federal Matrix/AMA land, as determined through the watershed analysis or AMA planning processes, as appropriate, or such management practices which comply with the current incidental take restrictions.

Application of either management strategy would absolve the affected non-Federal landowner from any liability for incidental take of an owl under the Act, resulting in the application of more uniform owl conservation standards within a matrix/AMA area regardless of land ownership.

The one exception to this policy would be where the adoption of matrix or AMA prescriptions could result in the incidental take of an owl whose site center is located within a Forest Plan reserve or Congressionally reserved or Administratively withdrawn area. In such a case, the incidental take restrictions would continue to apply for at least two more years. At the end of this period, the Service will review any new data or information involving the status of such owls and their habitats in the affected areas, including the results of any completed watershed analysis and other planning efforts under the Forest Plan. As noted previously in a discussion of this review process, the Service would assess on an area-by-area basis whether the continuation of the incidental take prohibition on affected non-Federal lands was still necessary and advisable for achieving the owl conservation goals of the Forest Plan. The Service would lift the incidental take restrictions where warranted and authorize the adoption of the final matrix or AMA prescriptions, at the discretion of the affected non-Federal landowner, as a means of avoiding an unauthorized incidental take of an owl.

Table 1 provides a summary of the various areas where incidental take relief could be provided or prohibitions retained in the two States affected by this proposed rule.

Table 1

Landowner type	Washington owl sites outside SEAs	Washington owl sites inside SEAs	California owl sites inside Klamath relief area	California owl sites inside CCPAs
Less than 80 acres . . .	Relief for all land-owners except for 70 acre core.	Relief except for 70-acre core	Relief for all land-owners except for 70-acre core	Relief except for 70-acre core.
80-5,000 Acres	Relief for all land-owners except for 70-acre core or where current restrictions are necessary to protect owls on a Federal reserve or withdrawn area (except for Olympic Penin-sula)	Matrix/AMA prescription option. Additional relief contingent upon acceptable Local Option Plan	Relief for all land-owners except for 70-acre core or where current restriction s are necessary to protect owls on a Federal reserve or withdrawn area . . .	Matrix/AMA prescription option. Additional relief contingent upon successful completion of NCCP process completion of NCCP process.

Landowner type	Washington owl sites outside SEAs	Washington owl sites inside SEAs	California owl sites inside Klamath relief area	California owl sites inside CCPAs
More than 5,000 acres.	Relief for all landowners except for 70-acre core or where current restrictions are necessary to protect owls on a Federal reserve or withdrawn area (except for the Olympic Peninsula).	Matrix/AMA prescription option. Additional relief contingent upon acceptable Local Option Plan	Relief for all landowners except for 70-acre core or where current restrictions are necessary to protect owls on a Federal reserve or withdrawn area . . .	Matrix/AMA prescription option. Additional relief contingent upon successful completion of NCCP process.

Incidental Take on Tribal Lands

For Indian forest lands, as that term is defined at 25 CFR 163.1, in California and Washington, the proposed rule would result in the reduction of the current Federal prohibition against the incidental take of the spotted owl. Under this proposal, Tribes would be required to maintain only the closest 70 acres of suitable owl habitat around an owl site center. Any additional restrictions or prohibitions under Tribal law would continue to apply. The Service is proposing this approach in recognition of the conservation benefits provided the northern spotted owl under harvest methods practiced by many Indian Nations, such as the Yakima Indian Nation in Washington. Many tribal lands are already

managed under conservation strategies for the owl or are of little habitat value for the bird. Moreover, the Service notes that the Secretary's trust responsibility for Native Americans provides him with additional fiduciary factors to weigh in exercising his broad discretionary authority under Section 4(d) of the Act.

Sunset Provision

The Service proposes a process that could result in the modification of the prohibitions of incidental take that are retained under this proposed rule should future biological information so warrant in either California or Washington.

Under this sunset provision, the Service would periodically evaluate the conservation goals for non-Federal lands within SEAs or possible CCPAs and would decide whether the conservation goals for owls in those areas have been accomplished as a result of future HCPs, no-take agreements, or other affirmative conservation activities. Should the Service conclude that success has been achieved in reaching the conservation needs of the species within a given area, restrictions due to incidental take prohibitions could be further modified or lifted, as information warrants.

Other Federal Mechanisms for Promoting the Conservation of the Spotted Owl

The listing of the spotted owl, the designation of its critical habitat, and the application of Act regulations at 50 CFR Part 17 have extended the protection of the Act to this species. Under section 7 of the Act and the implementing consultation regulations at 50 CFR 402, individual project review occurs through the consultation process for those actions authorized, funded, or carried out by Federal agencies that may affect a listed species like the spotted owl or its designated critical habitat. The Section 7 consultation process is designed to ensure that a proposed action is not likely to jeopardize the continued existence of the species or adversely modify its

critical habitat. The consultation process also requires the Service to determine what level of incidental take is likely to occur as a result of that action. After completing this determination, the Service issues an incidental take statement that is designed to minimize both the level and the impact of take on listed species.

In 1982, Congress amended section 10(a)(1)(B) of the Act to provide an additional mechanism for encouraging non-Federal support for the conservation of listed species. More commonly known as Habitat Conservation Planning or HCPs, this mechanism authorizes the incidental take of a listed species in exchange for a commitment from a private developer or landowner for a long-term conservation program for the affected species.

Section 10(a)(1)(B) of the Act, requires non-Federal applicants to develop Habitat Conservation Plans for listed species which would be incidentally taken in the course of otherwise lawful activities, and to submit such plans along with an application for an incidental take permit. Such plans can direct significant private sector resources in support of the overall conservation of the affected species on non-Federal lands. Three section 10(a)(1)(B) incidental take permits for the northern spotted owl have already been issued by the Service. A number of other non-Federal entities are in the process of developing HCPs for the spotted owl. The section 10 HCP process will remain available to non-Federal landowners under the proposed rule and will provide an additional alternative for adjusting the incidental take prohibitions set forth in this proposed rule. The initiation of a major and aggressive Habitat Conservation Planning Program for non-Federal forestlands in the Pacific Northwest is an integral and crucial component of the Administration's overall owl conservation program. When combined with the conservation goals of the Federal Forest Plan and this pro-

posed section 4(d) rule, the Service's Habitat Conservation Planning initiative provides the third element for a comprehensive strategy for the owl.

Incentives for Restoring or Enhancing Owl Habitat

Prohibitions against the incidental take of the spotted owl have existed since the species was Federally listed in June of 1990. The Service believes that many landowners have felt threatened by the current regulations which could be viewed as a disincentive to enhance, restore, or maintain habitat in a condition that is suitable for owl nesting, roosting, foraging, or dispersal. The disincentive stems from landowners' fears that owls might establish residence on, or move through, their property and impede their ability to manage their timber resources. This disincentive has had the effect of increasing timber harvest of currently suitable owl habitat and younger forests on non-Federal lands which are not presently affected by the presence of an owl. With regard to younger forests in particular, this concern or fear has accelerated harvest rotations in an effort to avoid the regrowth of habitat that is useable by owls.

For those non-Federal lands which are not currently affected by incidental take restrictions for spotted owls, the Service proposes to provide a new incentive to landowners to voluntarily manage their lands in a manner which aids in owl conservation without increased regulatory liability for the landowner. In particular, the Service desires to encourage landowners to restore or enhance former owl habitat which has been previously altered and is of little current value to the owl. The Service is also interested in encouraging owners of current suitable owl habitat to maintain that habitat and to forego premature cutting as the only perceived means of avoiding future incidental take restrictions for the owl.

The Service would offer to work directly with a non-Federal landowner through a written conservation or cooperative agreement for the purpose of managing, restoring or enhancing forest habitat so as to contribute to the survival and recovery of the owl. Working with the affected landowner, the Service would first establish an environmental baseline for the property to confirm that no Endangered Species Act-based spotted owl restrictions currently apply to the land. The Service might provide such other conservation advice or assistance as is feasible and available. The agreement would be of sufficient duration so as to enhance the conservation of the owl or to provide some benefit to the owl while still allowing economic use of the property during the term of the agreement.

At the end of the agreement, or at any time thereafter, the landowner would be free to use his or her property as desired without restrictions under the Act for the spotted owl. This would be the case even if an owl established residence or dependency upon the property at some point during or after the terms of the agreement. During the life of the agreement, the landowner also would be authorized to incidentally take any spotted owl which was otherwise in accordance with the use of the property under the agreement.

The Service believes that an incentives program of this sort will encourage primarily the development of dispersal habitat under restoration and enhancement agreements and will slow down the harvest of suitable owl habitat under habitat maintenance agreements. Under any of these approaches, there is a potential benefit for the spotted owl. Most owls using dispersal habitat are not likely to remain dependent upon that habitat as part of a resident pair or as a single. Instead, they are likely to use the area as a corridor for moving from one block of suitable habitat to another. Under these circum-

stances, any incidental take that might otherwise occur through land use activities on the property is likely to be inconsequential or very limited in impact or duration.

In addition, the opportunity for subsequent immunity from incidental take restrictions should provide an incentive to owners of suitable owl habitat to forego panic cutting and to enter into habitat maintenance agreements. By discouraging legal but potentially unsustainable harvests now, and stretching the retention of suitable owl habitat for the life of a maintenance agreement, the Service and the landowner would keep such habitat available for owl use during the pendency of the agreement.

Incidental Take of Other Listed Species

Several other Federally-listed species occur in the late-successional and old-growth forests that provide habitat for the spotted owl. The bald eagle (Haliaeetus leucocephalus), peregrine falcon (Falco peregrinus), gray wolf, grizzly bear (Ursus arctos), and marbled murrelet are known to occur on non-Federal lands in the range of the owl; the prohibition of take of these species incidental to timber harvest would remain in place.

The service is concerned about the effects of harvest activities on the marbled murrelet, particularly since the range of the spotted owl significantly overlaps the range of the murrelet. Some areas of relief under this proposed rule for the spotted owl might also provide habitat that is occupied by the marbled murrelet. Since the date of the original listing of the murrelet, the Service has been acquiring as much additional data and information as possible to identify the constituent elements of suitable murrelet habitat, as well as to expand a landowner's ability to determine whether or not such habitat is occupied. Significant progress also has been made in the development of a draft recovery plan for the murrelet. The draft recovery plan should be available for

public comments in two to three months. In order to aid a landowner in determining whether a property is occupied by murrelets, the Service encourages landowners to contact one of the Fish and Wildlife Service's three Ecological Services State offices noted previously in this document, and request guidance or information on delineating suitable murrelet habitat and conducting murrelet surveys to determine presence of murrelets on a given piece of property. This will ensure that landowners who might receive relief from owl restrictions under this proposed rule are aware of the latest data on occupied habitat for murrelets.

The Service recognizes that additional incidental take of spotted owls may occur in SEAs in Washington and CCPAs in California, as HCPs or other long-term conservation agreements, e.g. local option conservation plans, are implemented and further take is authorized. However, the Service believes that the overall level of incidental take is acceptable in light of the habitat-based conservation strategy in the Forest Plan and the fact that such plans or agreements must satisfy the conservation requirements of the Act. The Service will review the effects of the proposed rule under a section 7 consultation as part of the process to complete this proposed rule.

In Washington and California, the Service believes that the relief from prohibitions for non-Federal landowners outside of SEAs or CCPAs and for non-Federal landowners with holdings of less than 80 acres of forestland in a given SEA or CCPA would not preclude the recovery of the spotted owl and will facilitate the maintenance of habitat conditions in some areas by removing disincentives that currently account for the premature cutting of habitat.

In general, the contributions of Federal, State, Tribal and private land management and conservation efforts for protection of the spotted owl and other species allow for reduction of the prohibitions on incidental take of the owl in

many areas on non-Federal lands. As a result of this proposed rule, landowners would have more certainty about the conditions under which incidental take is likely to occur. Finally, the Service points to the long-term benefit to the owl of enhanced public support for the Act.

Public Comments Solicited

The Service intends that any final action resulting from this proposed rule would be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other government agencies, the scientific community, industry, or any other interested party concerning this proposed rule are solicited. In particular, the Service seeks comments on:

(1) The distribution, abundance, and population trends of spotted owls on non-Federal lands in Washington and California as they would relate to the approaches described in this proposed rule;

(2) The boundaries of the proposed SEAs or CCPAs identified for Washington and California and suggestions for modification of these boundaries. In order to better assess available data on the region, the Service particularly would like to encourage public comment on the question of whether it is necessary and advisable for the conservation of the spotted owl to designate a Special Emphasis Area on the western side of the Olympic Peninsula, and if so, whether the present proposed boundaries of the Hoh/Clearwater Special Emphasis Area are warranted or whether they should be reduced in size or significantly reconfigured.

(3) The distribution and abundance of spotted owl populations that are outside of SEAs or CCPAs;

(4) The biological and economic implications of applying the proposed rule in Washington and California;

(5) The applicability of the definitions of suitable habitat and dispersal habitat for the spotted owl, specific to provinces if possible;

(6) The implications of the proposed rule on small-acreage (less than 80 acres), medium-acreage (80 to 5,000 acres), and large-acreage (more than 5,000 acres) non-Federal landowners and comments on how these different ownerships are addressed in the proposed rule;

(7) The scope and effect of the "local option" process for landowners who own 80 to 5,000 acres in SEAs in the state of Washington;

(8) The biological or economic implication of proposing a different SEA/CCPA approach where non-Federal buffers would be retained around any owl site centers located on Federal reserves in designated areas, and whether SEA/CCPA boundaries would change as a result of applying this type of approach; and

(9) Recommendations or comments on how to implement the proposed Habitat Enhancement Agreement conservation program for the owl, particularly with regards to possible provisions of such agreements, scope of duration of such agreements and land use assurances to private landowners which would be necessary to encourage voluntary participation.

Final promulgation of the proposed rule will take into consideration the comments and any information received by the Service. Any information the Service receives during the comment period may lead to a final rule that differs from this proposed rule.

The Act provides for a public hearing on the proposed rule, if requested. Requests must be received within 45 days of the date of publication of this proposed rule. Such requests must be written and addressed to: Regional Director, Region 1, U.S. Fish & Wildlife Service, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181.

Section 7 Consultation

Review, pursuant to section 7 of the Act, will be conducted prior to issuance of a final rule to ensure that the proposed action will not jeopardize the continued existence of the spotted owl or any other listed species.

National Environmental Policy Act

The Fish and Wildlife Service is complying with NEPA in implementing the provisions of this proposed rule. The Service prepared an environmental assessment on this proposal and has decided to engage in a more intensive assessment of impacts through the preparation of an environmental impact statement (EIS). The Service is preparing a draft EIS at this time. The draft EIS will be published and available for public review and comment approximately 60 days after publication of this proposed rule. The end of the public comment period for the proposed rule will ultimately be extended to coincide with the end of the public comment period for the draft EIS.

Required Determinations

This proposed rule was reviewed under Executive Order 12866. The Service has not yet made a determination of the economic effects of the proposed rule on small entities as required under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Specific economic effects of the proposed action will be discussed in the economic analysis that is included in the Environmental Impact Statement (EIS) for the proposed action. The EIS will be published and available for public

comment at a later date. This rule does not require a Federalism assessment under Executive Order 12612 because it would not have any significant federalism effects as described in the order. The collection of information contained in this proposed rule have been approved by the office of Management and Budget under U.S.C. 3501 et seq. and assigned clearance number 1018-0022. The Service has determined that this proposed action qualifies for categorical exclusion under the requirements of Executive Order 12630, "Government Actions and Interference with Constitutionally Protected Property Rights", and preparation of a Takings Implications Assessment is not required. Regulations that authorize take of listed species, as is proposed in this special rule, are designated as categorical exclusions.

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Authors

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List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

Accordingly, the Service hereby proposes to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below: PART 17--[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

s17.11 [Amended]

2. Section 17.11(h), is amended by revising the "special rules" column in the table entry for "Owl, northern spotted" under BIRDS to read 1117.41(c)" instead of "NA".

3. Section 17.41 is amended by adding paragraph (c) to read as follows:

s17.41 Special rules--birds.

* * * * *

(c) Northern spotted owl (Strix occidentalis caurina).

(1) Prohibitions. Except as provided in this paragraph (c)(1) or by a permit issued under paragraph (c)(2) of this

section, the following prohibitions apply to the northern spotted owl.

(i) Taking. Except as provided in this paragraph (c)(1)(i), no person shall take a northern spotted owl in Washington or California.

(A) Taking pursuant to cooperative agreements. Any employee or agent of the Fish and Wildlife Service (Service), or of a conservation agency of the State of Washington or State of California that is carrying out a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Endangered Species Act, who is designated by his/her agency for such purposes, may, when acting in the course of his/her official duties, take a northern spotted owl covered by an approved cooperative agreement to carry out a conservation program under the agreement in Washington or California.

(B) Taking by designated officials. Any employee or agent of the Service, National Park Service, Bureau of Land Management, U.S. Forest Service, Washington Department of Wildlife, or California Department of Fish and Game, who is designated by his/her agency for such purposes, may, when acting in the course of his/her official duties, take a northern spotted owl in Washington or California if such action is necessary to:

(1) Aid a sick, injured or orphaned owl;

(2) Dispose of a dead owl; or

(3) Salvage a dead owl which may be useful for scientific study: Provided, that any taking pursuant to paragraph (c)(1)(i)(B) of this section must be reported in writing to the U.S. Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, DC 20036, within 5 days. The specimen may only be retained, disposed of or salvaged in accordance with directions from the Service.

(C) Incidental Take on Tribal Lands. On Indian forest lands in Washington and California, as defined in 25 CFR 163.1, any person may, when acting in accordance with tribal forestry rules and regulations, take a northern spotted owl incidental to timber harvest activity if the harvest does not destroy or degrade the 70 acres of nesting, roosting and foraging habitat closest to an owl site center.

(D) Spotted Owl Habitat Enhancement Agreement. Any person who has voluntarily entered into a Cooperative Habitat Enhancement Agreement (Agreement) with the Service for the purpose of restoring, enhancing or maintaining forestland habitat to aid in the conservation of the spotted owl may, pursuant to the terms of that Agreement, incidentally take spotted owls on the subject lands either during or after the period when the Agreement is in effect: Provided, that such Agreements shall only apply to parcels of land that are free of all incidental take restrictions for the spotted owl as of the date that such Agreements enter into force and effect, and that such Agreements must be of sufficient duration to aid in the conservation of the spotted owl.

(E) Incidental Take in State of Washington. The provisions of this paragraph (c)(1)(i)(E) shall apply to the incidental take of northern spotted owls from timber harvest activity in the State of Washington.

(1) Outside Special Emphasis Areas (SEA). Any person may take a northern spotted owl incidental to timber harvest activity outside an SEA if the harvest does not destroy or degrade the 70 acres of nesting, roosting and foraging habitat closest to an owl site center: Provided, that such incidental take is not authorized with regard to an owl whose site center is located within and along ***9511** the boundary of an SEA; or a Federal reserve or Congressionally reserved or Administratively withdrawn area which is otherwise located off the Olympic Peninsula.

(2) Inside SEAs--Matrix and Adaptive Management Area authorization. Any person may take a northern spotted owl incidental to timber harvest activity within an SEA if the harvest is on non-Federal land surrounded by or located within Federal Matrix or Adaptive Management Area lands and complies with the final Federal harvest prescriptions or restrictions adopted for such lands: Provided, that this authorization shall not apply to any northern spotted owl whose site center is located within a Federal Reserve or a Congressionally reserved area or Administratively withdrawn area.

(3) Inside SEAs--Small landowners. Any person who owns, on February 17, 1995, no more than 80 acres of forestland within a given SEA, may take a northern spotted owl incidental to timber harvest activity within such 80 acres if the harvest does not destroy or degrade the 70 acres of nesting, roosting and foraging habitat closest to an owl site center.

(4) Inside SEAs--Local option conservation plans.

(i) Authorization. Any person who owns on February 17, 1995 more than 80 acres, but not more than 5000 acres, of forestland in a given SEA may take a northern spotted owl incidental to timber harvest activity conducted on such land in accordance with a Local Option Conservation Plan approved by the Service.

(ii) Application. Each application for a Local Option Conservation Plan shall be submitted to the Service's State Supervisor, U.S. Fish and Wildlife Service, 3704 Griffin Lane SE, Suite 102, Olympia, Washington 98501, on an official application (Form 3-200) provided by the Service. Each application must include, as an attachment, a plan that contains a description of the area to be covered by the proposed plan; the size of the affected land ownership(s) and the intended duration of the plan; the number of affected

spotted owls and the habitat condition in the area to be covered by the proposed plan, if known; the extent to which the plan will contribute to or be consistent with the owl conservation needs identified for the SEA affected by the plan; the extent to which the incidental take of spotted owls resulting from timber activities under the plan will be complementary with the goals of the Federal Forest Plan for the affected area; the extent to which the land is adjacent to, or interspersed within, Federal Matrix or Adaptive Management Area lands and a description of the final management prescriptions delineated for any such lands, if known; the measures to be taken to minimize and mitigate the impacts of incidental take of spotted owls; the impact of the plan on affected watershed(s); what commitments the landowner(s) will provide to ensure implementation or adequate funding for the plan; what procedures will be used to deal with any unforeseen circumstances which could result in significant adverse effects to spotted owls in the affected area; any additional measures the Service requires as being necessary or appropriate for the goals of the plan to be met, e.g., reporting and review requirements; and, where the State has implemented regulations for a local option conservation plan review process that complements or is consistent with this proposed rule, whether the State has certified the plan.

(iii) Approval. After consideration of the information submitted with an application and received during a public comment period, the service shall approve a Local Option Conservation Plan if it finds that any anticipated taking will be incidental; the applicant will minimize and mitigate the impact of such takings; the local option conservation plan contributes to or is consistent with the conservation needs of the northern spotted owl in the affected SEA and will not result in the incidental take of a spotted owl deemed essential for providing demographic support for a Federal reserve established under the Federal Forest Plan as necessary to achieve conservation objectives; the applicant will provide

adequate assurances or funding for the implementation of the local option plan; and the taking will not appreciably reduce the likelihood of survival and recovery of any listed species in the wild.

(5) Safe Harbor Authorization. Any person may take a northern spotted owl incidental to timber harvest activity within an SEA if the harvest does not destroy or degrade the 70 acres of nesting, roosting and foraging habitat closest to an owl site center, and does not reduce, to less than 40 percent, the amount of nesting, roosting and foraging habitat within the median annual home range of the affected owl.

(6) Sunset provision. The Service shall periodically review and evaluate the effectiveness of the conservation measures and program for the spotted owl for each SEA. If the review indicates that the conservation goals for an SEA have been effectively achieved, the Service shall propose regulations to modify or withdraw the incidental take prohibitions in this paragraph as appropriate with respect to such SEA.

(F) Incidental Take in State of California. The provisions of this paragraph (c)(1)(i)(F) shall apply to the incidental take of northern spotted owls from timber harvest activity in the State of California.

(1) Klamath Province Relief Area. Any person may take a northern spotted owl incidental to timber harvest activity in the Klamath Province Relief Area (Figure 1 to s17.41(c)) if the harvest does not destroy or degrade the 70 acres of nesting, roosting and foraging habitat closest to an owl site center: Provided, that such incidental take is not authorized with regard to an owl whose site center is located within and along the boundary of a Federal reserve or a Congressionally reserved or Administratively withdrawn area.

(2) Potential California Conservation Planning Areas.

(i) Matrix and Adaptive Management Area authorization. Any person may take a northern spotted owl incidental to timber harvest activity within a potential California Conservation Planning Area (CCPA) if the harvest is on non-Federal land surrounded by or located within Federal Matrix or Adaptive Management Area lands and complies with the final Federal harvest prescriptions or restrictions adopted for such lands: Provided, that this authorization shall not apply to any northern spotted owl whose site center is located within a Federal reserve or a Congressionally reserved or Administratively withdrawn area.

(ii) Small landowners. Any person who owns, on February 17, 1995, no more than 80 acres of forestland within a given potential CCPA may take a northern spotted owl incidental to timber harvest activity within such 80 acres if the harvest does not destroy or degrade the 70 acres of nesting, roosting and foraging habitat closest to an owl site center.

(iii) Natural Communities Conservation Plans. Any person may take a northern spotted owl incidental to timber harvest activity within a potential CCPA if the harvest is conducted in accordance with a Natural Communities Conservation Plan (Plan) for spotted owls prepared by the State of California and approved by the Service. The Service shall approve any such Plan if it finds that the Plan is consistent with achieving the conservation goals for the spotted owl in the affected CCPA, is complementary to the Federal Forest Plan and is consistent with the criteria of section 10(a)(2) of the Endangered Species Act (16 USC 1539(a)(2)).

***9512** (iv) Safe Harbor Authorization. Any person may take northern spotted owls incidental to timber harvest activity within a potential CCPA if the harvest does not destroy or degrade the 70 acres of nesting, roosting and foraging habitat closest to an owl site center, and does not

reduce, to less than 40 percent, the amount of nesting, roosting and foraging habitat within the median annual home range of the affected owl.

(v) Sunset provision. The Service shall periodically review and evaluate the effectiveness of the conservation measures and program for the spotted owl established for each CCPA. If the review indicates that the conservation goals for a CCPA have been effectively achieved, the Service shall propose regulations to modify or withdraw the incidental take prohibitions of this paragraph, as appropriate, with respect to such CCPA.

(ii) Unlawfully taken owls. No person shall possess, sell, deliver, carry, transport, or ship, any northern spotted owl taken in violation of paragraph (c)(1)(i) of this section: Provided, that Federal and State law enforcement officers may possess, deliver, carry, transport or ship any endangered wildlife taken in violation of the Act as necessary in performing their official duties.

(iii) Commercial transportation. No person shall deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity any northern spotted owl.

(iv) Sales. No person shall sell or offer for sale in interstate or foreign commerce any northern spotted owl.

(v) Importation or exportation. No person shall import into the United States, or export from the United States, any northern spotted owl.

(2) Permits. In accordance with the provisions of s17.32 of this Part, permits are available to authorize otherwise prohibited activities involving the northern spotted owl in Washington and California.

(3) Definitions. As used in this paragraph (c):

(i) Administratively withdrawn area means lands that are excluded from planned or programmed timber harvest under agency planning documents or the preferred alternative for draft agency planning documents.

(ii) Adaptive management area means the 10 landscape units that were adopted in the April 13, 1994 Record of Decision for Amendments to U.S. Forest Service and Bureau of Land Management Planning Documents within the Range of the Northern Spotted Owl (USDA/USDI 1994) for development and testing of technical and social approaches to achieving specific ecological, economic, and other social objectives.

(iii) Congressionally reserved area means lands with Congressional designations that preclude timber harvest, as well as other Federal lands not administered by the Forest Service or Bureau of Land Management, including National Parks and Monuments, Wild and Scenic Rivers, National Wildlife Refuges, and military reservations.

(iv) Federal Forest Plan means the Federal forest management strategies, standards and guidelines adopted in the April 13, 1994, Record of Decision for the Final Supplemental Environmental Impact Statement for 19 National Forests and 7 Bureau of Land Management Districts located within the range of the northern spotted owl.

(v) Federal Matrix Land means those Federal lands generally available for programmed timber harvest which are outside of the Congressionally reserved and Administratively withdrawn areas, Federal reserves and Adaptive Management Areas as delineated in the Standards and Guidelines adopted in the April 13, 1994, Record of Decision.

(vi) Federal Reserve means those Federal lands delineated in the April 13, 1994, Record of Decision on which programmed timber harvest is not allowed and is otherwise severely limited. There are two types of reserves: late--

successional reserves, which are designed to produce contiguous, blocks of older forest stands; and riparian reserves, which consist of protected strips along the banks of rivers, streams, lakes, and wetlands that act as a buffer between these water bodies and areas where timber harvesting is allowed.

(vii) Home range means the area a spotted owl traverses in the course of normal activities in fulfilling its biological needs during the course of its life span.

(viii)Nesting, roosting and foraging habitat or suitable habitat means those ..areas with the following vegetative structure and composition necessary to assure successful nesting, roosting, and foraging activities for a territorial single or breeding pair of spotted owls:

(A) In the California provinces, suitable habitat consists, as a general matter, of coniferous or mixed coniferous/hardwood forests with multiple canopy layers; multiple overstory conifers greater than 16 inches in diameter at breast height (dbh); and total canopy closure among dominant, co-dominant, and understory trees of greater than 60 percent;

(B) In the Western Washington Lowlands province, the Western Washington Cascades province, and the Washington Olympic Peninsula province, suitable habitat consists, as a general matter, of coniferous or mixed coniferous/ hardwood forests with multiple canopy layers; multiple large overstory conifers greater than 20 inches dbh, and total canopy closure among dominant, co-dominant and understory species of greater than 60 percent;

(C) In the Eastern Washington Cascades province, suitable habitat consists, as a general matter, of coniferous forests with stands that contain greater than 20 percent fir (Douglas fir, Grand fir) and/or hemlock trees; multiple canopy layers of multiple large overstory conifers greater

than 12 inches dbh; and total canopy closure among dominant, co-dominant and understory species of greater than 50 percent.

(ix) Northern spotted owl, spotted owl, or owl means any northern spotted owl (Strix occidentalis caurina), alive or dead, and any part, egg, nest, or product thereof.

(x) Person has the meaning provided in 16 USC 1532(13).

(xi) Potential California Conservation Planning Area (CCPA) means any of the following four areas in the State of California (Figure 1 to s17.41(c)):

(A) California Coastal Area (Humboldt Meridian and Baseline) (Figure 2 to s17.41(c))

Beginning at the intersection of the California-Oregon State Line and the shoreline of the Pacific Ocean, then east along the California-Oregon State Line, then south along the east border of S33 T19NR01E, S04 T18NR01E, S09 T18NR01E, S16 T18NR01E, S21 T18NR01E, S28 T18NR01E, S33 T18NR01E, then west along the south border of S33 T18NR01E, then south along the east border of S05 T17NR01E, S06 T17NR01E, then east along the north border of S16 T17NR01E, then south along the east border of S16 T17NR01E, S21 T17NR0IE, S28 T17NR01E, S33 T17NR01E, and S04 T16NR01E, then east along the north border of S10 T16NR01E, then south along the east border of S10 T16NR01E, S15 T16NR01E, then east along the north border of S23 T16NR01E, then south along the east border of S23 T16NR0IE and S26 T16NR01E, then east along the north border of S36 T16NR0IE, then south along the east border of S36 T16NR01E, then east along the north border of S06 T15NR02E, then south along the east border of S06 T15NR02E, S07 T15NR02E, S18 T15NR02E, then east along the north border of S20 T15NR02E, S21 T15NR02E, S22 T15NR02E, S23 T15NR02E, then north along the west

border of S13 T15NR02E, *9513 S12 T15NR02E, then east along the north border of S12 T15NR02E, S07 T15NR03E, S08 T15NR03E, then south along the east border of S08 T15NR03E, S17 T15NR03E, then west along the south border of S17 T15NR03E, then south along the east border of S19 T15NR03E, S30 T15NR03E, S31 T15NR03E, then west along the south border of S31 T15NR03E, then south along the east border of T14NR02E, T13NRO2, and T12NR02E, then east along the north border of T12NR03E, then south along the east border of T12NR03E and T11NR03E, then east along the north border of S06 T10NR04E, then south along the east border of S06 T10NR04E, S07 T10NR04E, S18 T10NR04E, S19 T10NR04E, S30 T10NR04E, S31 T10NR04E, S06 T09NR04E, S07, T09NR04E, S18 T09NR04E, then southwest along the north border of the Hoopa Valley Indian Reservation, then southeast along the west border of the Hoopa Valley Indian Reservation, then south along the east border of S17 T07NR04E, S20 T07NR04E, S29 T07NR04E, S32 T07NR04E, S05 T06NR04E, S08 T06NR04E, S17 T06NR04E, S20 T06NR04E, S29 T06NR04E, S32 T06NR04E, then east along the north border of S04 T05NR04E, then south along the east border of S04 T05NR04E, then east along the north border of S10 T05NR04E, then south along the east border of S10 T05NR04E, S15 T05NR04E, S22 T05NR04E, then east along the north border of S26 T05NR04E, S25 T05NR04E, then south along the east border of T05NR04E and T04NR04E, then east along the north border of S31 T04NR05E, then south along the east border of S31 T04NR05E, S06 T3NR05E, S07 T3NR05E, S18 T3NR05E, then east along the north border of S20 T03NR05E, S21 T03NR05E, then south along the east border of S21 T3NR05E, S28 T3NR05E, S33 T3NR05E, S04 T02NR05E, S09 T02NR05E, S16 T02NR05E, then east along the north border of S22 T02NR05E, then south along the east border of S22 T02NR05E, then east along the north border of S26

T02NR05E, S25 T02NR05E, then south along the east border of T02NR05E, then east along the north border of T01NR06E, then south along the east border of S03 T01NR06E, S10 T01NR06E, S15 T01NR06E, S22 T01NR06E, then east along the north border of S26 T01NR06E, then south along the east border of S26 T01NR06E, then east along the north border of S36 T01NR06E, S31 T01NR07E, then north along the east border of S29 T01NR07E, then east along the north border of S29 T01NR07E, then south along the east border of S29 T01NR07E, S32 T01NR07E, then west along the south border of T01NR07E, then south along the east border of T01SR06E, then west along the south border of S24 T01SR06E, S23 T01SR06E, S22 T01SR06E, S21 T01SR06E, S20 T01SR06E, S19 T01SR06E, S24 T01SR05E, S23 T01SR05E, then south along the east border of S27 T01SR05E, S34 T01SR05E, then east along the north border of S02 T02SR05E, then south along the east border of S02 T02SR05E, S11 T02SR05E, S14 T02SR05E, then east along the north border of S24 T02SR05E, then south along the east border of T02SR05E, then east along the north border of S31 T02SR06E, then south along the east border of S31 T02SR06E, then east along the north border of S06 T03SR06E, S05 T03SR06E, S04 T03SR06E, S03 T03SR06E, S02 T03SR06E, S01 T03SR06E, then south along the east border of T03SR06E, then west along Ruth Zenia Road, Alderpoint Bluff Road, Zenia Bluff Road, Alder Point Road, then south along Harris Road, Bell Springs Road, and U.S. Highway 101, then west along Sebatopol Road, Bodega Highway, and California Highway 1, then north along California Highway 1, then west along Salmon Creek, then north along the shoreline of the Pacific Ocean to the point of beginning.

(B) Hardwood Region (Mt Diablo Meridian and Baseline Except Where Township Designation Is Followed by *

Which Indicates Humboldt Meridian and Baseline) (Figure 2 to s17.41(c))

Beginning at the Intersection of Ruth Zenia Road and the east border of T03SR06E*, then south along the east border of T03SR06E*, then east along the north border of T04SR07E* and T04SR08E*, then south along the east border of T04SR08E* and T05SR08E*,/****Meridian Change/ then east along the north border of T05SR08E* and T25NR12W, then south along the east border of T25NR12W, then east along the north border of S18 T25NR11W, S17 T25NR11W, S16 T25NR11W, then south along the east border of S16 T25NR11W, S21 T25NR11W, then west along the south border of S21 T25NR11W, S20 T25NR11W, then south along the east border of S30 T25NR11W, then west along the south border of S30 T25NR11W, then south along the east border of T25NR12W, S01 T24NR12W, and S12 T24NR12W, then east and south along the border of the Trinity National Forest, then east along the north border of S32 T24NR11W, then south along the east border of S32 T24NR11W, then east along the north border of S04 T23NR11W, then south along the east border of S04 T23NR11W, S09 T23NR11W, S16 T23NR11W, then east along the north border of S22 T23NR11W, S23 T23NR11W, S24 T23NR11W, S19 T23NR10W, then south along the east border of S19 T23NR10W, S30 T23NR10W, S31 T23NR10W, then east along California State Highway 162, then south along the eastern border of the East Cascades Province, then north along the shoreline of the Pacific Ocean, then east along Salmon Creek, then south along California Highway 1, then east along Bodega Highway and Sebastopol Road, then north along U.S. Highway 101, Bell Springs Road, and Harris Road, then east along Alder Point Road, Zenia Bluff Road, Alderpoint Bluff Road and Ruth Zenia Road to the point of beginning.

(C) Wells Mountain-Bully Choop Area (Mt. Diablo Meridian and Baseline) (Figure 3 to s17.41(c))

Beginning at the northwest corner of S04 T34NR11W, then east along the north border of T34NR11W, then south along the east border of S03 T34NR11W and S10 T34NR11W, then east along the north border of S14 T34NR11W, S13 T34NR11W, S18 T34NR10W, then north along the east border of S08 T34NR10W, then east along the north border of S08 T34NR10W, then south along the east border of S08 T34NR10W, S17 T34NR10W, S20 T34NR10W, S29 T34NR10W, then east along the north border of S33 T34NR10W, then south along the east border of S33 T34NR10W, then east along the north border of S03 T34NR10W, then north along the west border of S35 T34NR10W, S26 T34NR10W, S23 T34NR10W, then east along the north border of S23 T34NR10W, then north along the west border of S13 T34NR10W, then east along the north border of S13 T34NR10W, S18 T34NR09W, S17 T34NR09W, and S16 T34NR09W, then north along California Highway 3, then east along the border of the Whiskeytown-Shasta-Trinity National Recreation Area, then south along the east border of S03 T34NR09W, then east along the north border of S11 T34NR09W, S12 T34NR09W, then south along the east border of T34NR09W, then east along the north border of S19 T34NR08W, S20 T34NR08W, then south along the east border of S20 T34NR08W, S29 T34NR08W, S32 T34NR08W, then west along the south border of S32 T34NR08W, then south along the east border of S06 T33NR08W, then east along the north border of S08 T33NR08W and S09 T33NR08W, then north along the west border of S03 T33NR08W, then east along the north ***9514** border of T33NR08W and T33NR07W, then south along Trinity Mountain Road, then east along California Highway 299, then south along the east border of S26 T32NR06W, S35 T32NR06W, S02 T31NR06W, then west along the south border of the southeast of S02 T31NR06W, then south along

the east border of the northwest of S11 T31NR06W, then west along the south border of the northwest of S11 T31NR06W and northeast S10 of T31NR06W, then south along Mule Town Road, then west along the boundary of the Klamath Province, then north along the west border of the northeast of S20 T30NR09W, then west along the Shasta-Trinity County Line, then north along the west border of T30NRO9W, then east along the south border of T31NR09W and T31NR10W, then south along the east border of S05 T30NR10W, then east along the south border of S05 T30NR10W, then north along the west border of S05 T30NR10W, then west along the south border of T31NR10W, then north along the west border of T31NR10W and T32NR10W, then east along California Highway 3, then west along California Highway 299, then north along the west border of S28 T34NR11W, S21 T34NR11W, S16 T34NR11W, S09 T34NR11W, S04 T34NR11W to the point of beginning.

(D) California Cascades, (Mt Diablo Meridian and Baseline) (Figure 3 to s17.41(c))

Beginning at the Intersection of Interstate Highway 5 and the California-Oregon State Line, then east along the California-Oregon State Line, then south along the Eastern Boundary of the California Cascades Province, then north along Mule Town Road, then east along the north border of the southeast of S10 T31NR06W and southwest of S11 T31NR06W, then north along the west border of the northeast of S11 T31NR06W, then east along the north border of the northeast of S11 T31NR06W, then north along the west border of S01 T31NR06W, S36 T32NR06W, and S25 T32NR06W, then west along California Highway 299, then north along Trinity Mountain Road, then east along the south border of T34NR07W and T34NR08W, then south along the east border of S04 T33NR08W, then west along the south border of S04 T33NR08W and S05 T33NR08W, then north

along the west border of S05 T33NR08W, then east along the north border of S05 T33NR08W, then north along the west border of S33 T34NR08W, S28 T34NR08W, S21 T34NR08W, then west along the south border of S17 T34NR08W, S18 T34NR08W, then north along the west border of S18 T34NR08W and S07 T34NR08W, then east along the south border of S01 T34NR09W, S02 T34NR09W, then north along the west border of the S02 T34NR09W, then west along the border of the Whiskeytown-Shasta-Trinity National Recreation Area then south along California Highway 3, then west along the south border of S09 T34NR09W, S08 T34NR09W, and S07 T34NR09W, then north along the west border of S07 T34NR09W, then east along the north border of S07 T34NR09W, then north along the west border of S05 T34NR09W, S32 T35NR09W, then west along the south border of S30 T35NR09W, then north along the west border of T35NR09W, then east along the north border of S19 T35NR09W, then north along the west border of S17 T35NR09W, then east along the north border of S17 T35NR09W, S16 T35NR09W, S15 T35NR09W, then north along the west border of S11 T35NR09W, then east along the north border of S11 T35NR09W, then north along the west border of S01 T35NR09W, then east along the north border of T35NR09W and T35NR08W, then north along the west border of S32 T36NR08W and S29 T36NR08W, then east along the north border of S29 T36NR08W, then north along the west border of S21 T36NR08W, S16 T36NR08W, S09 T36NR08W, S04 T36NR08W, then east along the north border of T36NR08W, then north along the west border of S34 T37NR08W, S27 T37NR08W, and S22 T37NR08W, then west along the south border of S16 T37NR08W, S17 T37NR08W, then north along the west border of S17 T37NR08W and S08 T37NR08W, then east along the north border of S08 T37NR08W, then north along the west border of S04 T37NR08W, then east along the north border of T37NR08W, then north along the west border of S36

T38NR08W, then east along the north border of S36 T38NR08W, then north along the west border of S30 T38NR07W, then west along the south border of S24 T38NR08W, then north along the west border of S24 T38NR08W and S13 T38NR08W, then east along the north border of S13 T38NR08W, then north along the west border of S07 T38NR07W, then east along the north border of S07 T38NR07W, S08 T38NR07W, S09 T38NR07W, then north along the west border of S03 T38NR07W, S34 T39NR07W, S27 T39NR07W, S22 T39NR07W, and S15 T39NR07W, then west and north along California Highway 3 and Interstate Highway 5 to the point of beginning.

(xii) Province or physiographic province means a geographic area having a similar set of biological and physical characteristics and processes due to effects of climate and geology which result in patterns of soils and broadscale plant communities. Habitat patterns, wildlife distributions, and historical land use patterns may differ significantly from those of adjacent provinces. The seven northern spotted owl provinces in the States of Washington and California are the Olympic Peninsula Province, the Western Washington Lowlands Province, the Western and Eastern Washington Cascades Provinces, and the California Coastal, Klamath and Cascades Provinces (Figure 4 to s17.41(c)).

(xiii)Record of Decision (ROD) means the April 13, 1994, Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents within the Range of the Northern Spotted Owl (USDA/USDI 1994).

(xiv)Special Emphasis Area (SEA) means any of the following six areas (Figure 5 to s17.41(c)) in the State of Washington (references are in relation to the Willamette Meridian and baseline):

(A) Columbia River Gorge/White Salmon (Figure 6 to s17.41(c))

(1) Columbia River Gorge Segment (Figure 6 to s17.41(c)) Beginning at the northwest corner of T03NR05E, then east along the north border of T03NR05E, T03NR06E, T03NR07E, T03NRO7.5E, and T03NR08E, then south along the east border of T03NR08E, then west along the north Shore of the Columbia River, then north along the west border of TOINR05E, T02NR05E, and T03NR05E to the Point of Beginning.

(2) White Salmon Segment (Figure 6 to s17.41(c)) Beginning at the northwest corner of T06NR10E, then east Along the north border of T06NR10E, then north along the west border of T07NR11E, then east along the north border of S19 T07NR11E, S20 T07NR11E, S21 T07NR11E, then south along the east border of S21 T07NR11E, S28 T07NR11E, then south along the west border of the Yakama Indian Reservation, then south along the east border of T05NR11E, T04NR11E, then southwest along Rattle Snake Creek, then south along the east border of T04NRlOE and T03NR10E, then west along the north Shore of the Columbia River, then north along the west border of T03NR09E, then east along the north border of T03NR09E, then north along the west border of T04NR10E, T05NR10E, and T06NRlOE to the point of beginning.

***9515** (B) Siouxon Creek (Figure 7 to s17.41(c))

Beginning at the intersection of the south border of S16 T06NR04E and the Cowlitz-Clark County line, then north and east along the Cowlitz-Clark County line, then south along the west border of S31 T07NR05E, then east along the north border of the SW of NW, SE of NW, and SW of NE S31 T07NR05E, then north along the west border of the NE of NE S31 T07NR05E, then east along the Lewis River, then south along the east border of S30 T07NR05E, then east

along the north border of S32 T07NR05E, then north along the west border of the SE of SW S29 T07NR05E, then east along the Lewis River, then south along the east border of the SW of SE S29 T07NR05E, then east along the north border of S32 T07NR05E, then north along the west border of S28 T07NR05E, then east along the north border of S28 T07NR05E, then south along the east border of the NE of NE S28 T07NR05E, then west along the south border of the NE of NE S28 T07NR05E, then south along the east border of the SW of NE S28 T07NR05E, then east along the north border of the NE of SE S28 T07NR05E, then south, along the east border S28 T07NR05E, then east along the channel of Swift Reservoir and the Lewis River, then south and west along the Gifford Pinchot National Forest boundary, then south along the Clark-Skamania County line, then west along Canyon Creek. then north along the west border of S03 T05NR04E and S34 T06NR04E, then west along the south border of NE of SE, NW of SE, and NE of SW S33 to 6NR04E, then north along the west border of the NE of SW S33 T06NR04E, then east along the north border of the NE of SW S33 T06NR04E, then north along the west border of the NE S33 T06NR04E and SE S28 T06NR04E, then east along the north border of the SE of S28 T06NR04E, then north along the west border of the SE of NE and NE of NE S28 T06NR04E, then east along the north border of S28 T06NR04E, then north along the west border S22 T06NR04E, then west along the south border of S16 T06NR04E to the point of beginning.

(C) Mineral Block (Figure 8 to s17.41(c))

Beginning at the northwest corner of T15NR03E, then east along the north border of T15NR03E, T15NR04E, T15NR05E and T15NR06E, then south along the east border of TlSNR06E and T14NR06E, then west along the south border of T14NR06E, then south along the east border of T13NR06E and T12NR06E, then west along the south border of S24, S23, S23, S21, S20, and S19 T12NR06E, then south

along the east border of S24 T12NR05E, then west along the south border of S24, S23, S22, S21, S20, and S19 T12NR05E, then north along the west border of T12NR05E, then northwest along U.S. Highway 12, then west along the Tilton River, then north along the west border of T13NR03E, T14NR03E, and T15NR03E, to the point of beginning.

(D) I-90 Corridor (Figure 9 to s17.41(c))

Beginning at the northwest corner of T22NR09E, then east along the north border of T22NR09E and T22NR10E, then north along the west border of T22NR11E, then east along the north border of T22NR11E, then north along the west border of T22NR12E, then east along the north border of T22NR12E, T22NR13E, T22NR14E, T22NR15E, T22NR16E, and T22NR17E, then north along the west border of S34 T23NR17E, S27 T23NR17E, S22 T23NR17E, S15 T23NR17E, S10 T23NR17E, S03 T23NR17E, then east along the north border of S03 T23NR17E, then north along the west border of S34 T24NR17E, S27 T24NR17E, and S22 TNR17E, then east along the north border of S22 T24NR17E, S23 T24NR17E, S24 T24NR17E, S19 T24NR18E, S20 T24NR18E, S21 T24NR18E, then south along the east border of S21 T24NR18E, S28 T24NR18E, S33 T24NR18E, then west along the south border of S33 T24NR18E, then south along the east border of S04 T23NR18E, S09 T23NR18E, S16 T23NR18E, S21 T23NR18E, S8 T23NR18E, S33 T23NR18E, then east along the north border of S04 T22NR18E, then south along the east border of S04 T22NR18E, S09 T22NR18E, S16 T22NR18E, S21 T22NR18E, S28 T22NR18E, S33 T22NR18E, then west along the south border of T22NR18E, T2NR17E, then south along the east border of T21NR16E, then west along the south border of T21NR16E, then south along the east border of T20NR16E, then west along the south border of S13 T20NR16E, S14 T20NR16E, S15 T20NR16E, S16 T20NR16E, S17 T20NR16E, S18 T20NR16E, then south

along the east border of T20NR15E, T19NR15E, then east along the north border of T18NR15E, then south along the east border of T18NR15E, T17NR15E, then west along the south border of T17NR15E, then north along the west border of T17NR15E, T18NR15E, then west along the south border of T19NR15E, T19NR14E, T19NR13E, T19NR12E, T19NR11E, T19NR10E, T19NR09E, T19NR08E, then north along the west border of T19NR08E, then east along the north border of T19NR08E, then north along the west border of T20NR09E, T21NR09E, and T22NR09E to the point of beginning.

(E) Finney Block (Figure 10 to s17.41(c))

Beginning at the northwest corner of T36NR07E, then east along the north border of T36NR07E, T36NR08E and T36NR09E, then south along the east border of T36NR09E, then east along the north border of T35NR10E and T35NR11E, then south along the east border of T35NR11E, then west along the south border of T35NR11E, then south along the east border of T34NR10E, T33NR10E, T32NR10E, then west along the south border of T32NR10E, T32NR09E, T32NR08E, and T32NR07E, then north along the west border of S34 T32NR07E, then west along the south border of the southeast of the northeast quarter of S34 T32NR07E, then north along the west border of the southeast of the northeast quarter of S34 T32NR07E, then west along the south border of the northwest of the northeast quarter of S34 T32NR07E, northeast quarter of the northwest quarter of S34 T32NR07E, northwest quarter of the northwest quarter of S34 T32NR07E, and northeast quarter of the northeast quarter of S32 T32NR07E, then north along the west border of the northwest quarter of the northwest quarter of S32 T32NR07E, then west along south border of S29 T32NR07E, S30 T32NR07E, then south along the east border of the northwest of the northeast quarter, the southwest of the northeast quarter, the northwest of the southeast quarter, and the southwest of the southeast

quarter of S31 of T32NR07E, then west along the south border of T32NR07E, then north along the west border of T32NR07E, T33NR07E, T34NR07E, T35NR07E, and T36NR07E to the point of beginning.

(F) Hoh/Clearwater (Olympic Peninsula) (Figure 11 to s17.41(c)) (1) Hoh/ Clearwater--North.

Beginning at the Intersection of the Olympic National Park Boundary, and the north border of T30NR15W, then east along the north border of T30NR15W, T30NR14W, T30NR13W, then south along the Olympic National Forest Boundary, then east along the north border of the southwest quarter of the southwest quarter of S23 T29NR13W, then south along the east border of the southwest quarter of the southwest quarter of S23 T29NR13W, then west along the south border of the southwest quarter of the southwest quarter of S23 T29NR13W, then south along the east border S27 T29NR13W, then east along the north border of the southwest quarter of the southwest quarter of S26 T29NR13W, the southeast quarter of the southwest quarter of S26 ***9516** T29NR13W, and the southwest quarter of the southeast quarter of S26 T29NR13W, then south along the east border of the southwest quarter of the southeast quarter of S26 T29NR13W, then east along the north border of S35 T29NR13W, then south along the east border of S35 T29NR13W, then east along the north border of the southwest quarter of the northwest quarter of S36 T29NR13W, the southeast quarter of the northwest quarter of S36 T29NR13W, the southwest quarter of the northeast quarter of S36 T29NR13W, and the southeast quarter of the northeast quarter of S36 T29NR13W, then south along the east border of T29NR13W and T28NR13W, then east along the north border of T27NR12W, then south along the Olympic National Park Boundary, then west along the south border of S20 T25NR10W and S19 T25NR10W, then south along the east border of S25 T25NR11W and S36

T25NR11W, then east along the north border of T24NR11W, then south and west along the Olympic National Park Boundary, then west along the north border of the Quinalt Indian Reservation, then north along the Olympic National Park Boundary to the point of beginning.

(2) Hoh/Clearwater--South. Beginning at the Intersection of U.S. Highway 101 and the Queets River Road in S34 T24N R12W, then north along the Queets River Road, then south along the east border of S34 T24NR12W, then east along the Olympic National Forest boundary, then south along the east border of T24NR11W and S01 T23NR11W, then east and south along the border of the Quinalt Indian Reservation, then west along U.S. Highway 101 to the point of beginning.

(xv) Site center means the actual nest tree of a pair of spotted owls or the primary roost for a non-nesting pair or territorial single.

(xvi)Timber harvest activity or harvest means any activity which results in the harvest or felling of trees comprising the suitable habitat of a northern spotted owl.

(4) Information Collection. The collection of information requirements contained in s17.41(c) have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and regulations, on the issuance or denial of permits. Response is required to obtain or retain a permit. Public burden for this collection of information is estimated to vary from 15 minutes to 4 hours per response, with an average of 1.028 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data

needed, and completing and reviewing the collection of information. Send comments regarding this burden or any other aspect of this collection of information, including suggestions for reducing the burden, to the Service Information Collection Clearance Office, MS-224 ARLSQ, Fish and Wildlife Service, Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1018-0022), Washington, DC 20503.

BILLING CODE 4310-55-P

Dated: February 13, 1995.

George T. Frampton, Jr., Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 95-3922 Filed 2-16-95; 8:45 am]

BILLING CODE 4310-55-C

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing SECOND SUPPLEMENTAL AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW on July 2, 2003, by mailing the original and 9 copies thereof by first-class mail with the United States Postal Service to:

State Court Administrator
Case Records Division
Supreme Court Building
1163 State Street
Salem, OR 97310

I further certify that I served the foregoing SECOND SUPPLEMENTAL AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW on July 2, 2003, by mailing two correct copies thereof by first-class mail with the United States Postal Service to:

Hardy Myers
Mary H. Williams
David F. Coursen
Appellate Division
Department of Justice
1162 Court Street NE
Salem, OR 97310

Attorneys for Defendant-Respondent

DATED: July 2, 2003

Phillip D. Chadsey, OSB No. 66028

Scott E. Crawford, OSB No. 93241

Of Attorneys for Plaintiff-Petitioner on Review Boise Cascade Corporation

APPENDIX S

Oregon
DEPARTMENT OF
FORESTRY

STATE FORESTER'S
OFFICE

"STEWARDSHIP IN
FORESTRY"

October 15, 1997

Mike Hicks
Boise Cascade Corporation
450 Pacific Avenue
Monmouth, Oregon 97361

Dear Mike:

Through routine surveying and tracking of northern spotted owls conducted by the Department of Forestry's Lands Management Program, it has recently been determined that the parcel of forestland retained by Boise Cascade Corp. (when it sold off other holdings to Agency Creek in 1991)on Walker Creek, located at SW 1/4 Section 6, T6N, R6W, in Clatsop County, no longer fits the criteria for being designated as a northern spotted owl nesting site as used in OAR 629-665-210 (formerly OAR 629-24-809).

For the purposes of this rule, nesting site means the tree, when known, that contains the nest, or when not known, the activity center, of a *pair of adult spotted owls*. Of the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at the Buster Quarry site more than eight miles away. No responses to surveying were registered this past season at the Walker Creek site.

In 1992, Boise Cascade filed notifications and written plans with the department for harvesting at this site. The

written plan for a portion of the tract was denied because it did not adequately address the protection of a 70 acre area of suitable habitat around the nesting site. With the information that we have now regarding the site, if a notification were filed for harvest on this area, there would be no requirement for a written plan under the Forest Practices Act based on the existence of a northern spotted owl nesting site. Of course, any other requirements for written plans, such as operating within 100 feet of a fish-bearing stream, would still apply.

Although this parcel no longer qualifies as a northern spotted owl nesting site under the Oregon Forest Practices Act, I do not know how it will be regarded by the U.S. Fish and Wildlife Service under the Endangered Species Act. Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location. The Department of Forestry will be informing the U.S. Fish and Wildlife Service of our determination by copy of this letter.

Sincerely,

/s/ Charlie Stone
Charlie Stone
Forest Practices Director

CHS:na
cc: Members of the Oregon Board of Forestry
James E. Brown, State Forester
Russell Peterson, Regional Director, USFWS
Paula Burgess, Governor's National Resources Assistant
William Cloran, Asst. Attorney General
Phillip D. Chadsey, Stoel Rives, LLP

APPENDIX T

CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF CLATSOP

[DEC 24 1997]

No. 03-2018

BOISE CASCADE CORPORATION, a Delaware Corporation,
Plaintiff,

v.

STATE OF OREGON, BY AND THROUGH THE OREGON STATE BOARD OF FORESTRY,
Defendant.

MONEY JUDGMENT

The claims presented in this case have been fully and finally adjudicated as follows:

Plaintiff's First Claim for Relief for Inverse Condemnation under the Oregon Constitution was voluntarily dismissed on plaintiff's own motion.

On Plaintiff's Second Claim for—Relief Count Two (Lucas Per Se Claim U.S. Constitution), the court ordered that summary judgment be entered in favor of plaintiff.

On Defendant's Alternative Counterclaim (Declaratory Judgment) the court declares that the taking was temporary and defendant did not acquire a fee interest in plaintiff's property.

Finally, Plaintiff's Second Claim for Relief - Count One (Loretto Per Se Claim-U.S. Constitution) was submitted to the jury which found in favor of plaintiff and against defendant.

Based on the jury's special interrogatory verdict in this action, dated November 21, 1997, plaintiff's damages in this action are as follows:

1.	January 15, 1993 Fair Market Value	$2,279,233
2.	Interest at the statutory legal rate of 9 percent per annum from the date of the taking, January 15, 1993, to the date the taking was lifted, October 17, 1997 (as determined by the court)	$1,156,251
3.	Sum of 1 and 2	$3,435,484
4.	October 17, 1997 Fair Market Value	$1,615,425
5.	Just Compensation for Temporary Taking of Plaintiff's Timber for period from January 15, 1993 to October 17, 1997 (3 minus 4)	$1,820,059

THEREFORE, IT IS ORDERED AND ADJUDGED that plaintiff shall have judgment against defendant as stated below.

MONEY JUDGMENT

A.	Judgment Creditor:	Boise Cascade Corporation
B.	Judgment Creditor's Attorney:	Philip D. Chadsey, OSB No. 66028
C.	Judgment Debtor:	State of Oregon
D.	The amount of the judgment:	$1,820,059.00
E.	Pre-judgment Interest:	None
F.	The judgment creditor is owed interest on $1,820,059.00 at the rate of 9 percent per annum from October 17, 1997.	
G.	Costs	Costs shall be determined following entry of judgment pursuant to ORCP 68 C.

DATED this 24 day of December, 1997.

/s/ Paula Brownhill
Paula J. Brownhill
Circuit Court Judge

SUBMITTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

APPENDIX U

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

No. 93-2018

BOISE CASCADE CORPORATION, a Delaware Corporation,
Plaintiff-Appellant,

v.

STATE OF OREGON, BY AND THROUGH
THE OREGON STATE BOARD OF FORESTRY,
Defendant-Respondent.

MOTION TO RECONSIDER COURT'S PRIOR OPINION IN THIS CASE BASED UPON A RECENT U.S. SUPREME COURT DECISION THAT IS CONTROLLING, WHICH OVERRULES THIS COURT'S EARLIER DICTUM

Based upon the U.S. Supreme Court's recent opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US ___, 122 S Ct 1465, ___ L Ed ___ 2002, decided April 23, 2002, plaintiff-appellant moves the court to reconsider its earlier opinion in this case stating that plaintiff could not base its takings claim on a physical occupation theory. *Boise Cascade Corp. v. Board of Forestry*, 164 Or App 114, 125-26, 991 P 2d 563 (1999). In *Tahoe-Sierra*, the Court, indicated that physical takings are "easily identified," and went on in footnote 19 to define the differences between a physical taking and a regulatory taking. *Id.* at 1479. A physical taking involves the landowner's right to exclude others from its property and the use of the property

for a public purpose. *Id.* "*A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.*" *Id.* (emphasis added). Since this case involves plaintiff's right to exclude spotted owls from its property by prohibiting the logging of their habitat and the government's claimed right to use plaintiff's timber for the public purpose of providing nesting habitat, plaintiff's claim should clearly be analyzed as a physical taking and not as a regulatory taking as this court stated in its 1999 opinion. 164 Or App at 126. A unanimous jury in this case found a physical taking because plaintiff had been required to submit to an occupation of its property by a pair of northern spotted owls. *Id.* at 117. Plaintiff, under the subject regulation, was prohibited from doing anything that would cause the birds to "flush," or otherwise exclude them, so that the timber could be used for the public purpose of providing nesting habitat for the owls. OAR 629-665-0210(1)(a)-(b).

This court is of course bound to apply the decisions of the U.S. Supreme Court involving the Fifth Amendment's Takings Clause as to all cases currently pending before it. Because this court erroneously decided the physical takings issue in the earlier appeal, and the U.S. Supreme Court has subsequently made clear that this court's prior opinion was in error, this court must overrule its earlier dictum concerning plaintiff's physical takings claim. *Blanchard v. Kaiser Foundation Health Plan*, 136 Or App 466, 470, 901 P2d 943 *rev den* 322 Or 362 (1995); *see also Greene v. Rothschild*, 414 P2d 1013, 1016 (Wash 1966).

DATED: May 28, 2002.

/s/ Phillip D. Chadsey
Phillip D. Chadsey, OSB No. 66028
Charles F. Adams, OSB No. 75402
James N. Westwood, OSB No. 74339
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 294-9376
Of Attorneys for Plaintiff-Appellant
Boise Cascade Corporation

Michael D. Reynolds, OSB No. 74269
Appellate Division
Department of Justice
1162 Court Street NE
Salem, OR 97310
Telephone: (503) 378-4402
Attorneys for Defendant-Respondent

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing BOISE CASCADE OPPOSITION TO RESPONDENT'S MO-TION FOR EXTENSION OF TIME on May 28, 2002, by mailing the original and twenty copies thereof by first-class mail with the United States Postal Service to:

State Court Administrator
Case Records Division
Supreme Court Building
1163 State Street
Salem, OR 97310

I further certify that I served the foregoing BOISE CASCADE OPPOSITION TO RESPONDENT'S MOTION FOR EXTENSION OF TIME on May 28, 2002, by mailing two correct copies thereof by first-class mail with the United States Postal Service to:

Michael D. Reynolds
Solicitor General
Mary H. Williams
Jonathan H. Fussner
Appellate Division
Department of Justice
1162 Court Street NE
Salem, OR 97310
Facsimile: (503) 6306
Telephone: (503) 378-4402

Attorneys for Defendant-Respondent

/s/Phillip D. Chadsey
Phillip D. Chadsey, OSB No. 66028
Attorneys for Plaintiff-Appellant

APPENDIX V

IN THE SUPREME COURT OF THE
STATE OF OREGON

BOISE CASCADE CORPORATION, a Delaware corporation, Plaintiff/Petitioner on Review,	Supreme Court No. S _____ Court of Appeals No. A 115966
v.	Clatsop County Circuit Court
STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY, Defendant/Respondent on Review.	No. 93-2018

AMENDED PETITION FOR REVIEW

(Petitioner Will File Brief on the Merits if Review Is Allowed)
Review of the Opinion of the Oregon Court of Appeals, Affirming in Part and Reversing in Part, on Appeal from the Clatsop County Circuit Court
Honorable Paula Brownhill, Judge

Date of Opinion:	February 12, 2003
Author:	Deits, C.J.
Concurring:	Haselton, Wollheim, JJ.

Names and Addresses of Counsel on Inside Cover

April 7, 2003

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PETITION FOR REVIEW

PRAYER FOR REVIEW

Boise Cascade Corporation ("Boise Cascade") petitions this Court to review the Oregon Court of Appeals' decision in *Boise Cascade Corp. v. Board of Forestry*, 186 Or App 291, 63 P3d 598 (2003), a copy of which is Appendix A. Boise Cascade respectfully requests this Court to reverse that part of the court of appeals' decision which affirmed the circuit court's denial of Boise Cascade's motion for summary judgment, and affirm that part of the court of appeals' decision which reversed the circuit court's entry of summary judgment in favor of the State of Oregon.

LEGAL QUESTIONS PRESENTED ON REVIEW

1. Whether the Supremacy Clause of the U.S. Constitution required the Oregon Court of Appeals to apply relevant new case law from the U.S. Supreme Court to Boise Cascade's pending federal constitutional takings claims?

2. Whether Boise Cascade was obligated to seek an Incidental Take Permit ("ITP") from the U.S. Fish & Wildlife Service ("FWS") to satisfy the "ripeness" requirement for pursuit of its federal constitutional regulatory takings claim under *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992), where an ITP would not have required the Oregon Board of Forestry ("BOF") to rescind its Final Order banning Boise Cascade from logging the subject timber, and where neither state nor federal law provided that an ITP could overrule or modify the effects of the BOF's Final Order in any respect?

3. Whether the Oregon Court of Appeals erred in dismissing Boise Cascade's physical occupation takings claim, brought on the theory that the Oregon Department of Forestry's ("ODF") prohibition of logging, to enable occupancy of the site as a. northern spotted owl nesting site,

was a compensable government-authorized "physical occupation" taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419,102 S Ct 3164, 73 L Ed 2d 868 (1982).

RULES OF LAW TO BE ESTABLISHED

1. The Oregon state courts are required by the Supremacy Clause of the U.S. Constitution to apply new case law from the U.S. Supreme Court to pending federal constitutional takings claims.

2. A federal constitutional regulatory takings claim in Oregon becomes "ripe" for adjudication when a state agency issues a Final Order that effectively "takes" the subject property. The landowner is not required in such circumstances to seek a collateral order from a federal agency that has no independent authority to overrule or grant the landowner relief from the effects of the state agency's Final Order.

3. When the State compels the preservation of a wildlife habitat on private property for occupancy by an endangered or threatened species, the Fifth and Fourteenth Amendments to the U.S. Constitution require the State to pay just compensation for a taking of a servitude in the property for that purpose.

REASONS FOR REVERSAL IN PART AND AFFIRMANCE IN PART

In its prior opinion *Boise Cascade Corp. v. State of Oregon*, 164 Or App 114, 991 P2d 563 (1999) (*Boise IV*),[1] the Oregon Court of Appeals decided two federal

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[1] The other prior decisions in this case are: *Boise Cascade Corp. v. Board of Forestry*, 131 Or App 552, 886 P2d 1041 (1994); *affd* 325 Or 203 (1997) (*Boise I*); and *Boise Cascade v. Board of Forestry*, 131 Or App 538, 886 P2d 1033 (1994) (*Boise II*); *affd in part and rev'd in part* 325 Or 185 (1997) (*Boise III*).

constitutional issues-ripeness and the elements of a physical taking-that were addressed in subsequent decisions of the U.S. Supreme Court. *See Palazzolo v. Rhode Island*, 533 US 606, 121 S Ct 2448, 150 L Ed 2d 592 (2001) (ripeness); and *Tahoe-Sierra Preserv. v. Tahoe Reg. Planning*, 535 US 302, 122 S Ct 1465, 152 L Ed 2d 517 (2002) (defining the distinction between a physical and a regulatory taking). Boise Cascade brought these new decisions to the attention of the court of appeals and sought reconsideration of *Boise IV*, which the court of appeals denied. (*See* Appendices B, C and D.)

Boise Cascade petitions for review of the opinion below, *Boise Cascade Corp. v. Board of Forestry*, 186 Or App 291, 294, 63 P3d 598 (2003) (*Boise V*), because the court of appeals improperly invoked the "law of the case" doctrine, relied entirely upon its ruling in *Boise IV* on the ripeness and physical takings issues without substantive discussion; and failed properly to apply relevant new U.S. Supreme Court decisions, notwithstanding their binding effect under the Supremacy Clause upon the courts of this State on all issues of federal constitutional law in pending cases.

The Oregon Court of Appeals erred in ruling that a property owner asserting a federal regulatory takings claim for the imposition of a wildlife servitude must apply to the FWS for an ITP before the claim becomes "ripe." This judicially imposed ripeness requirement is contrary to federal law because the Fifth Amendment is self-enforcing, and the effects of the state agency's action in banning logging cannot be affected by an ITP. An ITP is a collateral order that does not vacate or modify the BOF's Final Order. The U.S. Supreme Court's recent decision in *Palazzolo* supports this position.

The court of appeals further erred in dismissing Boise Cascade's claim based on *Loretto* by relying on *Boise IV*, which focused upon the fact that the State has no control over

where spotted owls nest, rather than whether the State has required Boise Cascade to submit to a physical occupation of its property by the owls to provide them with nesting habitat. The U.S. Supreme Court in *Tahoe-Sierra* recently highlighted the bright-line distinction between physical and regulatory takings, and the test centers on government authorization of the occupation, not control over the occupant.

STATEMENT OF FACTS

The basic facts are set forth in the opinions of the Oregon Court of Appeals and this Court in the prior appeals in this case. *See supra*, note 1. This Court initially held that Boise Cascade had stated a claim for the taking of 56 acres of timber out of a 65-acre parcel known as the Walker Creek unit it owned in Clatsop County. *See Boise III*, 325 Or at 198.

Following remand to the circuit court for trial, Boise Cascade filed an amended complaint which pled its federal constitutional takings claim in two counts. The first, based on *Loretto*, alleged that Boise Cascade had been required to submit to a physical occupation of its Walker Creek unit by the owls through the BOF's disapproval of Boise Cascade's written harvest plan because the unit contained a spotted owl nest site. The second count, based on *Lucas*, alleged that the BOF's logging ban of the subject timber had denied Boise Cascade all economic use of that property.[2]

Boise Cascade then moved for summary judgment on both counts of its federal constitutional claim, supported by an affidavit of its timber manager. On October 14, 1997, the circuit court granted summary judgment on liability as to Boise Cascade's second *Lucas* count. In 1997 the ODF discovered that the Walker Creek unit female owl had died

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[2] Boise Cascade also alleged a separate takings claim based on Article I, section 18, of the Oregon Constitution. This claim was voluntarily dismissed at trial.

and the male had moved approximately eight miles away to a new nest site with a new mate. On that basis, the ODF declared the nesting site to have been abandoned and withdrew its objection to Boise Cascade's harvesting the unit. Boise Cascade then filed a Supplemental Complaint alleging a temporary taking for lost compensation during the nearly five years it was prevented from logging the timber.

At the trial in November 1997 Boise Cascade's *Loretto* count was submitted to the jury, which unanimously found that plaintiff had been required to submit to a physical occupation of its timber as a result of the BOF's Final Order. The jury could make this finding because the stated purpose of the subject regulations is to control habitat on private property by declaring it a public "sensitive resource" so that it can be "occupied" by a breeding pair of owls.[3] OAR 629-665-0210(2) (formerly OAR 629-024-0809(2)); OAR 629-680-0000 (formerly OAR 629-056-0010); OAR 629-680-0010(5) (formerly OAR 629-056-0020(5)); OAR 629-680-0100(1) (formerly OAR 629-056-0100(1)); OAR 629-680-0220 (formerly OAR 629-056-0220).

The BOF then appealed, assigning error in numerous respects. In *Boise IV*, 164 Or App 114, the court of appeals held, *inter alia*, (1) that the takings claims were not barred by the Eleventh Amendment, (2) that Boise Cascade failed to state a claim for a physical taking under *Loretto* by focusing its analysis upon the State's lack of control over the owls

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[3] By a 9-3 vote, the jury also determined the January 1993 fair market value of the timber, at the time the Final Order was entered, and its value in October 1997 when the State gave permission to log the unit. Based on those findings and the addition of interest from the date of the taking, the trial court determined the amount of just compensation to be awarded and entered a judgment for $1,820,059. The Oregon Court of Appeals erroneously states in *Boise IV* that the judgment was $2,279,223. 164 Or App at 117. The BOF's subsequent appeal did not assign error to the jury's determination of the value of the property taken.

rather than the government-authorized nature of their occupation of plaintiff's land, and (3) that the regulatory claim based upon *Lucas* should have been dismissed on ripeness grounds, because Boise Cascade had not applied for an ITP. *Id.* This Court then denied review, *see* 331 Or 244 (Oct. 24, 2000) (Table), and the U.S. Supreme Court denied Boise Cascade's petition for a writ of certiorari, *see* 532 US 923 (Mar. 19, 2001). Boise Cascade subsequently moved for reconsideration in light of the U.S. Supreme Court decisions in *Palazzolo* and *Tahoe-Sierra*, but the court of appeals denied the motion. (Appendices C and D.)

The case was remanded again to the circuit court and both parties sought summary judgment on the question of ripeness, with Boise Cascade specifically asserting the "futility" of an ITP application as grounds for finding the claim ripe. The circuit court granted the State's motion and denied Boise Cascade's motion, holding that litigation of the futility argument was barred by issue preclusion. On appeal, the State conceded that issue preclusion was an improper basis for the circuit court's ruling, because "futility" was never litigated before the Board in *Boise I*. The court of appeals therefore reversed the circuit court's entry of summary judgment in favor of the State. *Boise V*, 186 Or App at 298-99. It affirmed, however, with respect to the circuit court's denial of Boise Cascade's motion for summary judgment. The court of appeals rejected without elaboration plaintiff s argument that it should reconsider, in light of *Palazzolo*, whether the State's "ripeness" defense should have been dismissed in the first instance, since an ITP can have no effect upon the BOF's actions. Concerning futility alone, the court held there was an issue of fact for trial. Boise Cascade now brings this Petition for Review.

ARGUMENT

A. The Supremacy Clause of the U.S. Constitution[4] Required the Oregon Court of Appeals to Consider and Apply All Decisions of the U.S. Supreme Court Pertaining to the Federal Issues in This Appeal

1. The Court of Appeals Improperly Refused to Apply *Palazzolo* on the Issue of Ripeness and Futility

In *Boise IV* the court of appeals held that Boise Cascade's federal constitutional regulatory takings claim based on *Lucas* was not ripe because it had failed to seek an ITP from the FWS after the BOF denied its written plan to harvest the subject timber. Imposing a judicially created barrier to the assertion of plaintiff s Fifth Amendment rights, the court of appeals ruled that an ITP application was required unless it would have been futile to seek one. 164 Or App at 128-33; *see also Boise V*, 186 Or App at 294 (holding the same and relying without further discussion on *Boise IV*). The court's holding was clearly erroneous, because even if the FWS had granted Boise Cascade an ITP, the BOF at all times retained *plenary discretion* as to whether it should or should not reconsider its enforcement of *state regulations* where an ITP has been granted by the federal government. The subject regulation states:

> "Exceptions to the [Oregon state regulatory] requirements for protecting northern spotted owl nesting sites *may* be approved by the State Forester if the operator has obtained an incidental take permit from

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[4] The Supremacy Clause provides:

> "This Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art VI.

> federal authorities under the federal Endangered Species Act." OAR 629-665-0210(5) (formerly OAR 660-024-0809(5)) (emphasis and brackets added).

There is no ambiguity in that regulation. The existence of an ITP is merely something that the BOF may consider as a collateral matter. It does not even require the BOF to give consideration to an ITP when enforcing state regulations. The Board's discretion on the issue is unfettered. This Court should grant review because the court of appeals was informed of the *Palazzolo* decision and failed to properly apply it in *Boise V*. Specifically, the court of appeals (1) refused outright to even reconsider whether ripeness was a viable defense for the State in the first instance, and (2) then misapplied *Palazzolo* in reaching its conclusion that there was an issue of fact as to whether an application for an ITP would have been futile.

In *Palazzolo* the owner of a waterfront parcel containing wetlands sued the Rhode Island Coastal Resources Council ("RICRC"), an agency empowered by state law to promulgate and enforce regulations to protect and preserve property along the Rhode Island coastline. RICRC enforced its regulations, denying a number of development plans submitted by the plaintiff, who eventually brought an inverse condemnation action for a Fifth Amendment regulatory taking. The Rhode Island Supreme Court ruled in favor of the state, holding that the plaintiff's claim was not ripe even though RICRC had repeatedly denied him a development permit, because he had not sought a permit from the Rhode Island Department of Environmental Management and the local municipality. 533 US at 624. The U.S. Supreme Court reversed, holding that the Takings Clause of the Fifth Amendment does not allow state governments to impose "repetitive or unfair land-use procedures in order to avoid a final decision." *Id.* at 621. In rejecting the government's claim that the failure to seek approval from agencies other than RICRC made the claim

unripe, the Court held that "federal ripeness rules do not require the submission of further and futile applications with other agencies." *Id.* at 626.[5]

The holding in *Palazzolo* was brought to the attention of the court of appeals during the briefing of *Boise V* (Appendix B) with a request that the court reconsider its holding in *Boise IV* that ripeness was a viable defense, absent futility. The court of appeals rejected this out of hand in *Boise V*:

> "Most of Boise's arguments in support of summary judgment were to the effect that this court's decision concerning ripeness and futility in *Boise IV* was wrong. The trial court rejected those arguments and, to the extent that Boise repeats them at great length on this appeal, we reject them without further discussion. *See generally State v. Pratt*, 316 Or 561, 569, 853 P2d 827 (1993) (under the law of the case doctrine, 'when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further, steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal')." 186 Or App at 295.

Accentuating its refusal even to consider plaintiff s request that its claims should be reevaluated in light of new U.S. Supreme Court precedent, the court of appeals later stated:

> "As noted above, we summarily reject Boise's attempts to relitigate the issue decided in the previous appeal concerning the availability of the ripeness

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[5] The court of appeals in *Boise Cascade IV* had ignored a similar statement by the Court in *Williamson Co. Regional Planning v. Hamilton Bank*, 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985) (*see* Respondent's Brief in *Boise IV* at 25-26).

defense, thus disposing of the majority of the arguments Boise asserts in this appeal." *Id.* at 296.

The court of appeals ruled only as to whether Boise Cascade's motion for summary judgment on futility should be granted. It erred in affirming the circuit court's denial of that motion, because it incorrectly evaluated the issue as one calling for a particular quantum of proof that Boise Cascade would have been granted an ITP by the FWS. *Id.* at 299-304. That missed the central point of plaintiff s motion-that an ITP has no authoritative effect upon the BOF and the laws and regulations it enforced against Boise Cascade to cause the taking. The taking occurred as a result of a state agency enforcing state laws and state regulations that could neither be reversed nor modified by any ITP Boise Cascade might have obtained, because the BOF at all times retains plenary discretion to simply disregard an ITP. OAR 629-665-0210(5) (formerly OAR 660-024-0809(5)).

By denying Boise Cascade's motion and allowing the State to require a certain quantum of proof that an ITP would have been granted, the court of appeals let the fox back into the henhouse. The State can ban logging, and then prohibit the assertion of the federal constitutional right to just compensation by sending the plaintiff first to the federal government for a permit that the BOF may then ignore. *Palazzolo* bars this sort of administrative legerdemain as a matter of federal constitutional law. 533 US at 626 (citing *Felder v. Casey*, 487 US 131, 150-51, 108 S Ct 2302, 101 L Ed 2d 123 (1988). The Fifth Amendment rights of property owners cannot be impeded by states in requiring landowners to apply for permits that cannot provide the landowners with the ability to affect the state agency's decision to take the property. The court of appeals in *Boise V* merely pieced together from the case law its own sense of the "quantum of proof' that must be shown before "futility" is sufficiently demonstrated to render a regulatory taking claim ripe. That

approach presupposes that the federal law permit, if issued, could bar or limit the state's ability to take the subject property. Here, no such limitation was possible, so the quantum of proof was entirely irrelevant.[6]

2. The Court of Appeals Improperly Refused to Reconsider Its Prior Ruling on Boise *Cascade's* Claim for a Physical Occupational Taking

After the case had been briefed in the court of appeals and before it was argued, the U.S. Supreme Court decided *Tahoe-Sierra* in April 2002. A second holding of the court of appeals in *Boise IV* was that Boise Cascade could not base its claim on a physical taking theory.[7] *Boise IV*, 164 Or App at 126. *See also Boise V*, 186 Or App at 294. The court had held that a physical taking theory was inappropriate because "[t]he state has no control over where spotted owls choose to nest." 164 Or App at 126. The court went on to hold that in order to prevail, the plaintiff must proceed on a regulatory theory, which also involved the issue of ripeness discussed above.

In *Tahoe-Sierra* the U.S. Supreme Court laid down a bright-line test for distinguishing between a physical taking and a regulatory taking. 122 S Ct at 1479 n 19. First, a physical taking gives the government a right to use the property for a public purpose, while a regulatory taking "does

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[6] Plaintiff did submit evidence in support of its motion to show that an ITP would have been denied in any event. Boise Cascade did so to cautiously argue the point from more than one perspective. This did not mean, however, that the quantum of proof was relevant, and plaintiff clearly argued that it was not.

[7] A unanimous jury had found that plaintiff had been required to submit to a physical occupation of its property as a result of the Board of Forestry's order denying its written plan -to log the subject property. *See* 164 Or App at 124-26.

not give the government any right to use the property." *Id.* Second, a physical taking affects the right of the property owner to exclude others from using its property, while a regulatory taking does not. *Id.* Contrary to the Court's holding in *Boise IV*, control over the occupant is not a factor in a physical taking analysis.[8] In this case the State has asserted both the right to use Boise Cascade's property for a public purpose and denied it the right to exclude the owls by harvesting their nesting site or doing anything else that might cause them to leave the nesting site.[9]

Boise Cascade brought the *Tahoe-Sierra* opinion to the attention of the court of appeals pursuant to ORAP 5.85 and moved the court to reconsider its holding as to the physical takings issue in light of that decision. (Appendix C.)

On July 1, 2002, prior to oral argument, the court issued an order stating:

> "Appellant has moved for reconsideration of a portion of the court's decision disposing of a previous appeal in the same trial court case. The motion is denied on the ground that this court's prior decision is final and may not be altered by a way of a motion filed in a subsequent appeal." (Appendix D.)

The "law of the case" doctrine upon which the court of appeals relied in refusing to reconsider its *Boise IV* decision in light of the U.S. Supreme Court's subsequent decisions in *Palazzolo* and *Tahoe-Sierra* is not an absolute rule, but one based upon policy reasons that do not apply when a

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[8] The government had no control over the company that installed the cable television box in *Loretto*. The state of New York merely authorized the company to install it against the wishes of that property owner. 458 US at 432 n 9.

[9] The regulation that is the subject of this action, OAR 629-665-0210(1)(b), prevents the property owner from conducting any activities that might cause the "owls to flush" from the nesting site.

subsequent ruling by a higher court shows that the court's earlier decision was in error. *Marr v. Putnam*, 213 Or 17, 23, 321 P2d 1061 (1958); *Blanchard v. Kaiser Foundation Health Plan*, 136 Or App 466, 470, 901 P2d 943, *rev denied* 322 Or 362 (1995).

Moreover, pursuant to the Supremacy Clause of the U.S. Constitution, once the U.S. Supreme Court decides a federal constitutional question it becomes the law of the land and all state courts are required to follow that holding in all pending cases. *Cooper v. Aaron*, 358 US 1, 18, 78 S Ct 1401, 3 L Ed 2d 5 (1958); Martin v. Hunter's Lessee, 14 US (1 Wheat) 304, 4 L Ed 97 (1816).[10]

Thus, it was incumbent on the court of appeals to reconsider its earlier decision in Boise IV, in light of the subsequent decisions of the U.S. Supreme Court that bear upon the issues in this case until a final judgment is entered.

ISSUES OF IMPORTANCE TO THIS COURT

1. Proper enforcement of the Takings Clause as part of the Bill of Rights is of fundamental importance to all property owners; indeed, it is important for society as a whole, because we highly value the economic and individual freedoms inherent in a capitalist economic model that is predicated upon the right to own *private property*. In this regard, the courts of this State are bound by the Supremacy Clause to apply the takings jurisprudence of the U.S. Supreme Court. New federal case law that is pertinent to a pending claim must be given controlling precedential weight, and it is improper for state courts to rely upon the "law of the case" doctrine to disregard such decisions, even if it would require that a prior decision of the state court be vacated or modified. Until the final appellate judgment has been entered in the case

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[10] These cases were cited to the court of appeals in Plaintiffs'/Appellants' Reply Brief at 3.

and all appeals have been exhausted, the case remains pending, and new federal takings jurisprudence must be applied. This fundamental rule was not followed by the court of appeals in *Boise V*.

2. This Court should clarify for agencies and lower courts that the Fifth Amendment rights of a property owner are unconstitutionally impeded through the imposition of any ripeness requirement that calls for a collateral, ineffectual, or meaningless permit application with any agency other than the one which issues the Final Order. Ripeness is simply not an issue where the collateral permit in question would come from another agency that does not have any binding authority on the State's enforcement of its own laws and regulations that take private property for a public purpose. *First English Evan. Luth. Ch. v. Los Angeles City*, 482 US 304, 107 S Ct 2378, 96 L Ed 2d 250 (1987). This State's sovereignty and the principles of federalism prevent the federal government from compelling Oregon agencies to enforce federal environmental laws. *New York v. U.S.*, 505 US 144, 112 S Ct 2408, 120 L Ed 2d 120 (1992). Further, the Oregon Constitution prevents state agencies from delegating their responsibilities to any agency that is not bound by the Oregon Constitution. *Hillman v. North Wasco Co. PUD*, 213 Or 264,276-86,323 P2c1664 (1958).

3. The Oregon Court of Appeals continues to misread *Loretto* in this case, and in past cases. *See, e.g., GTE Northwest, Inc. v. Public Utility Commission*, 321 Or 458, 473, 900 P2d 495 (1995). The conflict between the Takings Clause of the Fifth Amendment and environmental laws is one that continues to generate a substantial amount of scholarly interest and publication.[11] *See* James P. Karp, "A Private Property Duty of Stewardship: Changing Our Land

[11] Scores and perhaps hundreds of law review articles have been written about this subject during the last 20 years.

Ethic," 23 *Envtl L* 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); Lynton K. Caldwell, "The Case for an Environmental Amendment to the Constitution of the United States for the Protection of the Environments," 1 *Duke Environmental Law and Policy Forum* at 1-10 (1991); Bernard H. Seigan, *Property and Freedom: The Constitution, the Courts and Land-Use Regulation* at 29 (1997). From a political rather than a moral standpoint, the Nobel laureate economist Friedrich von Hayek stated in his classic book *The Road to Serfdom*: "[T]he system of private property, is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not." Friedrich von Hayek, *The Road to Serfdom* 115 (50th anniv ed 1994). As the U.S. Supreme Court recently had occasion to remind the lower courts: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 US 374, 392, 114 S Ct 2309, 129 L Ed 2d 304 (1994). This case illustrates Justice Holmes' famous dictum in the seminal regulatory takings case: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 416, 43 S Ct 158, 67 L Ed 332 (1922).

Whether government desires to impose a servitude by regulation as in *Loretto*, *First English*, and this case, or exacts one through a written easement as in *Dolan* and *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the landowner is denied the use of its property when it cannot exclude an occupant authorized by the government.

It is important this Court make clear that it is the impact upon the property owner that is the focus of the legal analysis and not whether the government controls the occupant. Or, to state it another way: It is the exercise of control over the landowner's property and not the occupant that is important. It does not make any difference whether the authorized occupant is a human, some other form of animate being, or, as in *Loretto* and *First English*, an inanimate object or matter. 458 US at 438 n 16.

CONCLUSION

The Oregon Court of Appeals is refusing to follow the takings jurisprudence of -the U.S. Supreme Court by reading its cases too narrowly and misinterpreting them. *See Dolan v. City of Tigard*, 113 Or App 162,832 P2d 853 (1992), *affd* 317 Or 110 (1993), *rev'd* 512 US 374 (1994). It is also clear that a growing number of justices on the U.S. Supreme Court are becoming frustrated by state courts. As three members of the Court stated only last month: "The first two of the conceivable bases for the [California] Court of Appeal's decision are so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal. There is reason to believe that this may be more than a local and isolated phenomenon." *Lambert v. City & County of San Francisco*, No. 99-697, 2000 WL 305895 at *3 (US Mar. 27, 2000) (Scalia, Kennedy, and Thomas, JJ., dissenting from denial of certiorari); *see also Stevens v. City of Cannon Beach*, 510 US 1207, 114 S Ct 1332, 127 L Ed 2d 679 (1994) (Scalia and O'Connor; JJ., dissenting from Court's denial of certiorari).

This Court should grant review and reverse that part of the decision of the Oregon Court of Appeals which denied Boise Cascade's motion for summary judgment. The court of appeals' affirmance of the circuit court's denial of the State's

motion for summary judgment should be affirmed by this Court.

DATED: April 7, 2003.

/s/Scott Crawford
Phillip D. Chadsey, OSB No. 66028
Scott E. Crawford, OSB No. 93241
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 294-9376

Of Attorneys for Petitioner on Review
Boise Cascade Corporation

APPENDIX W

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

No. 93-2018

BOISE CASCADE CORPORATION, a Delaware Corporation,
Plaintiff-Appellant,

v.

STATE OF OREGON, BY AND THROUGH
THE OREGON STATE BOARD OF FORESTRY,
Defendants-Respondents.

ORDER DENYING MOTION TO
RECONSIDER PRIOR OPINION

Appellant has moved for reconsideration of a portion of the court's decision disposing of a previous appeal in the same trial court case. The motion is denied on the ground that this court's prior decision is final and may not be altered by way of a motion filed in a subsequent appeal.

Respondents' brief is due July 1, 2002.

/s/ Mary J. Deits
Chief Judge

JUN 24 2002
Date

c: Charles F. Adams
David F. Coursen

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

APPENDIX X

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

No. 93-2018

BOISE CASCADE CORPORATION, a Delaware Corporation,
Plaintiff-Appellant,

v.

STATE OF OREGON, BY AND THROUGH
THE OREGON STATE BOARD OF FORESTRY,
Defendant-Respondent.

ORDER ON RECONSIDERATION

On June 11, 2002, the court granted an extension of time through July 1, 2002, for filing of the respondent's brief. Appellant has filed an objection.

Upon reconsideration, *NO FURTHER* extensions of time will be granted. The respondent's brief remains due July 1, 2002. Failure to file the respondent's brief by July 1, 2002, shall result in this case proceeding without benefit of a respondent's brief.

/s/ Mary J. Deits
MARY J. DEITS
Chief Judge

June 18, 2002
Date

c: Charles F. Adams
David F. Coursen
OR245
bf

REPLIES SHOULD BE DIRECTED TO: THE STATE COURT ADMINISTRATOR, RECORDS SECTION SUPREME COURT BUILDING 1163 STATE STREET SALEM OREGON 97310

APPENDIX Y

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-6986
FAX: (503) 378-3784

June 16, 1992

Dale Hall
U.S. Fish and Wildlife Service
911 Northeast 11th
Portland, OR 97232

Re: Boise Cascade Operation Plan in Clatsop County
DOJ File No. 629-430-NR0092-92

Dear Mr. Hall:

This office represents the Oregon Department of Forestry (ODF). We have received a copy of the letter to you dated May 27, 1992, from Phil Chadsey, representing Boise Cascade Corporation (Boise). Although we do not intend to ask you to referee a debate on the Endangered Species Act or the Oregon Forest Practices Act, some clarification of ODF's position and intention is necessary, because Mr. Chadsey's letter substantially misstates them. He implies that ODF is acting under authority of the federal Endangered Species Act; in fact, ODF is simply enforcing state law—specifically, its Forest Practices rules.

ODF has not "established as a condition of logging the site that Boise Cascade obtain an incidental take permit from your agency." Rather, because Boise's written operation plan failed to meet the state's regulatory requirements for protecting spotted owl habitat, ODF referred Boise to an administrative rule that authorizes the State Forester to grant an exception to the state's habitat protection rules if the appropriate federal agency has issued an incidental take

permit. (Presumably, the rule reflects a policy of giving careful consideration to another government agency's decision that an operator has taken adequate alternative steps to protect habitat.) Without implying agreement with Mr. Chadsey's interpretation of the Endangered Species Act or any disinterest in USFWS's interpretation of the Act and implementing rules, interpretation of federal law is simply not an issue under the Oregon Forest Practices Rules.

The purpose of referring Boise to the alternative standard for protecting spotted owl habitat is not to shift responsibility to the federal government for the inverse condemnation claim that Boise has threatened to file. Instead, as I explained in the previous paragraph, we consider ODF's decision in this matter to be governed by Oregon law. Your agency's action is significant only to the extent that, if you grant an incidental take permit, the State Forester is then authorized to grant an exception to ODF's habitat protection rules. A decision that no incidental take permit is required under federal law would not meet the requirements of the Oregon administrative rule.

I hope this clarifies the state's position. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jerome Lidz
Jerome Lidz
Assistant Attorney General
Natural Resources Section

JSL:tmt/JGG037FA

c: The Honorable Thomas L. Sansonetti
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240
Phillip D. Chadsey
Stoel Rives Boley et al
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[JUL 28, 1997]

Civil No. 96-1575-HO

UNITED STATES OF AMERICA,
Plaintiff,

v.

WEST COAST FOREST RESOURCES LIMITED PARTNERSHIP AND DEANS MT. LOGGING CO
Defendants.

ORDER

The United States brought this suit to permanently enjoin the clearcut harvest of ninety-four acres of privately owned forest land in Lane County, Oregon, known as the Good Hominy Unit ("the Unit"). On July 28, 1997, this court denied the motion for permanent injunction and instead issued a temporary injunction for one year, in order to maintain the status quo until further research could be completed. The court ordered plaintiff to commence radiotelemetry monitoring of a pair of owls known as the "Chickahominy Pair" ("the owls," or "the pair"). Now before the court is plaintiff's motion for permanent injunction (#109). The court heard oral arguments and the presentation of evidence on November 9, and 10, 1999.

I. *Summary of Evidence Presented*

A. *Testimony of Dr. Forsman*

The United States presented the testimony of Dr. Eric Forsman, a Research Wildlife Biologist employed by the United States Forest Service, Pacific Northwest Research Lab in Corvallis, Oregon. Dr. Forsman opined that, although he cannot predict with absolute certainty whether harvesting the Unit would cause the owls to leave the site, it is reasonably certain that harvesting the Unit is likely to "significantly impact" the reproductive rates of the pair and its ability to survive on the current site. Dr. Forsman opined that harvesting the Unit will harm the pair by reducing the prey supply and causing an inability to roost in the Unit. He explained the chain of events that could lead to the owls' death: (1) clearcut; (2) prey in the area becomes no longer available; (3) reduction in prey forces owls to forage elsewhere; (4) the owls must expend more energy to find food; and (5) the owls could potentially starve to death, produce fewer young because of less food, or even be predated due to risky travel to other sources of food.

He acknowledged that if there was still enough habitat and prey after harvesting, there would be no significant effect on the owls. Dr. Forsman used a 75% Adaptive Kernal ("AK") method in determining the "core area." He found that the Unit was within the 75% AK for the male, but not for the female. He opined that 14% of the landscape inside the home range consists of older forests, and that 21% of the sightings from the study were in the older forests. He opined that 56% of the landscape is pole young and broad leaf, and that 60% of the sightings were in this tree type. He concluded that the older forests were used more than expected based on their availability. Based on prior research of other areas, Dr. Forsman opined that owls with 20% or less of old forest produced far fewer young than those with 60% or more.

Dr. Forsman's definition of "suitable habitat" included areas where owls are able to replace themselves. Dr. Forsman acknowledged that the telemetry study revealed that pole young and broadleaf were used for roosting and foraging by the owls, but opined that other studies of other sites indicates that pole young and broadleaf are not suitable habitat.

Dr. Forsman acknowledged the pair's recent high reproductive rate of .86, and that the increase occurred despite previous clearcuts in the area, but opined the high reproductive rate is not indicative of survivability because it is within a relatively short period of time.

B. *Testimony of Dr. Ramsey*

The government presented the testimony of Fred L. Ramsey, Ph.D., a professor of statistics at Oregon State University. Dr. Ramsey testified as to the relevancy of defendant's decision to change the boundaries of the proposed harvest. Following the telemetry study, defendant changed the boundaries to avoid areas containing numerous telemetry points. Dr. Ramsey opined that changing the Unit's boundary has no statistical validity. He further testified that without knowing habitat differences, no inference can be drawn from the fact that one area contains seven telemetry points, and another contains only one. Dr. Ramsey explained that the models created from the telemetry study are descriptive, not predictive, and that if there is no difference in habitat, then one could assume the points would be dispersed differently next time. Dr. Ramsey acknowledged that there may be a missing variable.

C. *Testimony of Dr. Rosenberg*

The government presented the testimony of Daniel K. Rosenberg, Ph.D., an assistant professor of wildlife ecology in the Department of Fisheries and Wildlife at Oregon State University. Dr. Rosenberg opined that it is reasonably certain that harvesting the Unit will significantly impact the reproduction and survival of the owls, and may lead to site abandonment. He explained that old forest is sparse in the Oregon Coast Range, the Unit includes old forest, and the telemetry study indicated a strong selection for older forests over pole young. Dr. Rosenberg noted that the Unit is highly associated with owl usage; it was clearly selected for foraging, particularly by the male owl. He acknowledged that the owls use pole young and broad leaf trees, but "not necessarily proportionate to their availability." He opined that pole young and broad leaf are not suitable habitat.

Dr. Rosenberg, in referring to the telemetry study, stated that the owls were almost three times more likely to select a stand within the Unit, rather than outside the Unit. He opined, "There's something about the Unit [that they prefer]." He stated that there could be other unknown variables present making the Unit "special."

He agreed with Dr. Ramsey that there is no reason to believe a revision of the Unit would be consequential, but that there may be an unidentified variable not accounted for. He further noted that the owls' main source of prey is the flying squirrel, and that accessibility to, rather than abundance of, prey is most important. He opined that there is no significant difference in the abundance of flying squirrels in old or new forests.

Dr. Rosenberg stated that a threshold of 30% of old forest must be met for survival of owls. He asserted that he did not find it surprising, but rather, encouraging, that despite the relatively low percentage of old forest currently in the area,

the owls have recently experienced a higher than average reproductive rate. In addition, in acknowledging that other nearby pairs whose habitats include higher percentages of old forests have experienced lower reproductive rates than the pair in the past three years, Dr. Rosenberg explained that reproductive rates are variable, and could be the product of other effects.

Dr. Rosenberg reasoned that his conclusion as to a detrimental effect on the owls can be made with reasonable certainty because: (1) the Unit is within the owls' home range; (2) the Unit is likely within the owls' core area; (3) the Unit contains portions of preferred old forest; (4) preferred old forests are already very limited in the owls' home range; (5) the owls are selecting the Unit; and (6) studies of other owls indicate that owls in areas with less than 30% older forest perform poorly.

Dr. Rosenberg stated that the telemetry study was descriptive in that it provided the parties with information as to the owls' home range and provided data that is consistent with general knowledge of owl behavior. He stated that using the data from the study, and combining that data with information known regarding the type of habitat and elevation suitable for owls allows researchers to predict future usage.

D. *Testimony* of Dr. McDonald

Defendant presented the testimony of Trent L. McDonald, Ph.D., a biomatrician employed by Western Ecosystems Technology, Inc., in Cheyenne, Wyoming. Dr. McDonald opined that the following factors are relevant variables in owl habitat selection: elevation, distanced to water, distance from the nest, and vegetation type. Dr. McDonald utilized these factors in creating "resource selection function" models, and concluded that, when all the factors that influence owl use are

integrated together, the area within the Unit is not significant to the owls.[1]

E. *Testimony of Dr. Irwin*

Defendant presented the testimony of Larry L. Irwin, the Wildlife Program Manager employed by the National Council for Air and Stream Improvement. Dr. Irwin noted that relevant factors include elevation, distance to the nest site, and vegetation types. Dr. Irwin opined that harvesting the Unit will not affect the owls' essential life functions. He reasoned that: (1) there is sufficient suitable habitat even without the Unit; (2) these particular owls have had a relatively high reproductive rate; (3) the Unit is far from the nest site, and therefore, the likelihood of future use is low due to distance and elevation factors; and (4) the only recorded use of the Unit was by the male for foraging, and he will forage elsewhere if the Unit is not available.

Dr. Irwin opined that the threshold amount for suitable habitat for owl survival is 20%. He further noted that the owls are selecting pole young and broad leaf, and thus, these vegetation types must be included as suitable habitat. Based on this premise, he opined that there is over 70% suitable habitat available in the home range, and harvesting the Unit will remove only approximately 5% of the total suitable habitat. He further noted that from 1991 through 1998, the reproductive rate of the owl pair was .86 per year, as compared to other owls in the coast range which average .65 - .70 per year. Dr. Irwin acknowledged that the Unit has some suitable habitat, but opined that if the Unit was unavailable other resources would still be available. He concluded that clearcutting the Unit would affect the owls' foraging "very minimally."

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[1] The court notes that defendants' experts generally referred to the new Unit boundaries, whereas plaintiffs' experts generally referred to the old Unit boundaries. The court's conclusion is the same regardless of which boundaries are considered.

F. *Testimony of Mr. Carson*

Defendant presented the testimony of Robert G. Carson, a wildlife biologist for Mason Bruce & Girard, who performs "take" evaluations. He opined that pole young and broad leaf trees are suitable habitat. He reasoned that, according to the telemetry study, pole young trees were used 32% of the time, and broad leaf trees were used 24% of the time. He noted that old forest was used 21% of the time. He opined that the total amount of suitable habitat in the owls' home range is 64%.

He further reasoned that if the owls truly had available only 20% suitable habitat, then the expected reproductive rate would be .4, but that it is much higher. In referring to his table indicating the reproductivity of the owl pair as compared to other pairs in the coast range, the pair ranked 24th out of 133 pairs in high reproductive rates. He concluded that harvesting the Unit would not affect foraging and roosting behavior of the owls.

Mr. Carson acknowledged his previous opinion in September 1996 that broad leaf was not considered suitable, but explained that this previous opinion was based on a vegetation-based definition, but now that the telemetry study has been completed, a use-based definition of suitable habitat is more appropriate. This use-based definition indicates that broadleaf is suitable habitat. Whereas in 1996 he opined that there was 26% suitable habitat in the owls' home range, now, based on the use-based definition of suitable habitat which indicates that broad leaf should be included, he concluded that there is 65-70% suitable habitat in the owls' home range.

II. *Findings of Fact*

The court reaches the following findings of fact based on the evidence presented in both the initial and subsequent hearings. The court does not repeat findings already stated in this court's July 28, 1997, order. Unless otherwise indicated

due to these findings being made with the benefit of further studies following this court's prior order, this court's prior findings are incorporated herein.

The Unit is within the home range of the owl pair. The 95% Adaptive Kernal home range for the pair is approximately 3602 acres. The size and shape varies from year to year regardless of whether the Unit is cut.

The pair is actually using the Unit, primarily for foraging by the male owl.

The telemetry study revealed that the owls used older forests in a higher percentage than their availability. Pole young and broad leaf were also used heavily by the owls for foraging and constitute "suitable habitat" for these owls.[2]

When including pole young and broad leaf as suitable habitat for this owl pair, there is 60-70% suitable habitat located within the pair's actual home range.

The reproductive rate of these owls from 1991 through 1998 was .86 young per year, as compared to other owls in the coast range which average .65 - .7 per year.

III. *Standard for Issuance of Permanent Injunction*

Under section 9 of the Endangered Species Act ("ESA"), it is unlawful for any person to "take" an endangered or threatened species. 16 U.S.C. § 1538(a)(1). The court previously concluded that the northern spotted owl is a threatened species, and a primary reason for the bird's decline is the loss of suitable habitat. *See* Order dated July 28, 1997. "Take" includes actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage

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[2] The court states no opinion as to whether pole young and broad leaf may constitute "suitable habitat" in other circumstances. Rather, the court must consider all circumstances of each individual case to determine what is suitable habitat.

in any such conduct." *Id.* § 1532(19). The Secretary of the Interior has further defined "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3.

The burden is on the government to establish to a reasonable certainty that the proposed harvest will result in significant habitat modification that actually kills or injures the owls by significantly impairing the owls' essential behavioral patterns, including breeding, feeding, or sheltering. *See* 50 C.F.R. § 17.3

To establish "harm" from habitat modification, plaintiff must show "significant impairment of the species' breeding or feeding habits and prove that the habitat degradation prevents, or possibly, retards, recovery of species." *National Wildlife Federation v. Burlington Northern Railroad, Inc.*, 23 F.3d 1508, 1512-13 (9th Cir. 1994).

The harm that is imminent must be the death or actual injury of an identifiable species. "Mere speculation" is not sufficient; there must be "a definite threat of future harm to [a] protected species." *Burlington*, 23 F.3d at 1512 n.8.

Both parties agree that harvesting the Unit will at least affect the male owl's foraging in light of the evidence that the male owl has used the Unit for foraging on various occasions. Defendants correctly note, however, that this interference, alone, is not enough to satisfy the ESA. Rather, plaintiff must also prove by a preponderance of the evidence that this interference will "actually kill[] or injure[]" the owls. 50 C.F.R. § 17.3.

IV. *Conclusions of Law*

Plaintiff has failed to satisfy its burden of establishing to a reasonable certainty that harvesting the Unit will result in significant habitat modification that would actually kill or injure the owls by significantly impairing the owls' essential behavioral patterns, including breeding, feeding, or sheltering. The telemetry study indicates that this owl pair uses pole young and broad leaf trees for foraging throughout the home range. Although the study indicates that the pair used, and possibly even selected, old forest for foraging, plaintiff has failed to establish that the old forest in the Unit is essential to the owl's survival. The court is not persuaded that removing the Unit as a source of foraging will actually kill or injure the owls.

Unlike in *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), wherein the Ninth Circuit held that harvesting the proposed area "would likely harm marbled murrelets by impairing their breeding and increasing the likelihood of attack by predators on the adult murrelets as well as the young," *id.* at 1067-68, here, the evidence indicating that the owls also heavily used other old and young timber areas, outside the Unit, for foraging and other activities, and that the owls maintain relatively high reproductive rates, is persuasive that harvesting the Unit will not harm the owl pair.

V. *Conclusion*

For the foregoing reasons, plaintiff's motion for permanent injunction [#109] is denied.

IT IS SO ORDERED.

DATED this 10th day of March, 2000.

/s/ Michael R. Hogan
United States District Judge

APPENDIX AA

IN THE FEDERAL DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 93-6223-HO

STATE OF OREGON, ACTING BY AND THROUGH THE OREGON DEPARTMENT OF FORESTRY,

Plaintiff,

v.

COMPLAINT FOR DECLARATORY INTERNATIONAL PAPER CO., RELIEF FOREIGN CORPORATION; FOREST CONSERVATION COUNCIL, A DOMESTIC NONPROFIT CORPORATION; AND THE DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant.

I. INTRODUCTION

This is a suit for declaratory relief. Plaintiff seeks a declaration of its legal rights and responsibilities under the Endangered Species Act, 16 U.S.C. § 1531 to 1544. In particular, plaintiff seeks a declaration regarding the respective rights and responsibilities of the parties with respect to a timber sale under state timber sale contract No. 341-90-04, known as Roberts Creek No. 6, located in the Elliott State Forest, Coos County, Oregon.

II. JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346. This action arises under the Endangered Species Act. 16 U.S.C. § 1531 to 1544, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

III. PARTIES

The Oregon Department of Forestry is a duly constituted agency of the State of Oregon, having responsibility for the sale of certain timber on state lands, as well as the general management of timber.

IV.

Defendant International Paper Company is a foreign corporation having its principal place of business in the State of New York.

V.

Defendant Forest Conservation Council is a nonprofit Oregon corporation having its principal place of business in Portland, Oregon, and a branch office in Eugene, Oregon.

VI.

The United States Fish and Wildlife Service is a duly constituted agency of the United States Government and its Department of Interior having responsibility for the enforcement and implementation of the Endangered Species Act. Defendant Director of the United States Fish and Wildlife Service has responsibility for the actions of the employees of the Fish and Wildlife Service in carrying out its responsibilities with regard to the Endangered Species Act.

First Cause of Action

VII.

On or about March 23, 1990, the Oregon Department of Forestry entered into a timber sale contract with International Paper Company, being timber sale contract 341-90-04, and popularly known as the Roberts Creek No. 6 timber sale. The timber sold is located on the Elliott State Forest in Coos County, Oregon. Proceeds from the sale of the timber on this sale are dedicated to the "Common School Fund" and are to support the education of children in public schools from kindergarten through high school. A copy of the timber sale

contract is attached hereto as Exhibit 1 and incorporated by reference herein.

VIII.

On or about June 12, 1991, a pair of Northern Spotted Owls was discovered in or near the timber sale area. The Oregon Department of Forestry was formally notified of the existence of this owl pair in September, 1991, and, after conferring with the Oregon Department of Fish and Wildlife, notified defendant International Paper Company of the presence of this spotted owl pair on November 8, 1991.

IX.

The Northern Spotted Owl was listed as a "threatened" species under the provisions of the Endangered Species Act on July 23, 1990. Thereafter, the United States Fish and Wildlife Service issued guidelines for timber harvesting to avoid an "incidental take" of the Northern Spotted Owl. The term "take" is defined in the Endangered Species Act, 16 U.S.C. § 1532(19). An "incidental take" is a "take" incidental to the conducting of an otherwise lawful activity. Thereafter, in August, 1992, the United States Fish and Wildlife Service rescinded those guidelines. *See* Exhibit 2, attached hereto and incorporated by reference herein. However, even after the guidelines were rescinded, the United States Fish and Wildlife Service represented to the plaintiff and others that the rescinded guidelines represented the best biological information available to avoid an "incidental take" under the Endangered Species Act, and further informed the plaintiff that enforcement action could be taken against plaintiff and its employees, officers, and agents in the event of activity on state lands which could constitute a "take."

X.

Under the terms of the Endangered Species Act, it is unlawful for any person, including any state, or any officer,

employee, agent, department or instrumentality of any state, to "take" any endangered species. It is the policy of the State of Oregon and in particular, of this plaintiff, that the State of Oregon and its agencies will comply with the law, including the Endangered Species Act.

XI.

No owls were discovered in the vicinity of the Roberts Creek No. 6 timber sale in 1992. As yet, no owls have been discovered in that area during 1993.

XII.

The Marbled Murrelet was listed as a "threatened" species under the Endangered Species Act on October 1, 1992. In late 1992, plaintiff was informed of occupied behavior by at least one Marbled Murrelet in the near vicinity of the Roberts Creek No. 6 timber sale. No guidelines have been issued by the United States Fish and Wildlife Service to determine what activity or activities would constitute a "take" of the Marbled Murrelet under the Endangered Species Act, although plaintiff has repeatedly requested guidance from the United States Fish and Wildlife Service.

XIII.

Under the rescinded guidelines issued by the United Fish and Wildlife Service, as well as the protocols issued by the Service for owl surveying, it appears that allowing a harvest of the timber contained in the Roberts Creek No. 6 timber sale would result in a "take" of the Northern Spotted Owl. In addition, plaintiff fears that allowing timber harvest would result in a "take" of one or more members of the Marbled Murrelet species. It is both the policy and the desire of the plaintiff to avoid any unlawful "take" of any threatened or endangered species under the Endangered Species Act. It is the duty of plaintiff to carry out its contracts and to generate revenues from this sale for the Common School Fund.

XIV.

Defendant International Paper Company has given notice to the Oregon Department of Forestry of its intent to file suit for breach of the timber sale contract if it is not allowed to go forward and harvest timber on the Roberts Creek No. 6 timber sale. *See* Exhibit 3, attached hereto and incorporated by reference herein.

XV.

Defendant Forest Conservation Council has similarly given notice of its intent to sue plaintiff and others if plaintiff allows the timber sale to go forward. *See* Exhibit 4, attached hereto and incorporated by reference herein.

XVI.

Plaintiff has repeatedly sought the advice and assistance of the United States Fish and Wildlife Service regarding whether allowing a harvest of this timber sale would constitute a "take" of either the Northern Spotted Owl or the Marbled Murrelet. However, plaintiff has received no clear statements with respect to "take" and so remains uncertain of its rights and responsibilities under the Endangered Species Act.

XVII.

In addition to the other provisions of the timber sale contract at issue, defendant International Paper Company has agreed that it "shall at all times observe and comply with all federal and state laws, and lawful regulations issued thereunder and local bylaws, ordinances and regulations, which in any manner affect the activities of [International Paper Company] under this contract." Exhibit 1, at section 21. It is the position of the plaintiff that this provision requires International Paper Company to comply with the provisions of the Endangered Species Act, and, lawful regulations pursuant to it.

XVIII.

As a result of the notice of intent to sue tendered by defendants International Paper Company and Forest Conservation Council, plaintiff is at risk of receiving inconsistent legal interpretations of its rights and responsibilities. In addition, in the event that plaintiff allows the timber sale to be harvested, plaintiff is subject to civil and criminal penalties at the hands of the United States Fish and Wildlife Service and the United States Government pursuant to the provisions of the Endangered Species Act.

XIX.

A real and substantial controversy exists between the parties hereto. This controversy can be settled only by a common adjudication in one forum. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays for a declaration of the respective rights, responsibilities, and legal obligations of the parties, individually and among and between themselves, with respect to the Roberts Creek No. 6 timber sale contract No. 341-90-04.

DATED this _____ day of July, 1993.

Respectfully submitted,

THEODORE R. KULONGOSKI
Attorney General
WILLIAM F. CLORAN #72050
Assistant Attorney General
DENISE G. FJORDBECK #82257
Assistant Attorney General
GEOFFREY M. HUNTINGTON, #90025
Assistant Attorney General
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APPENDIX BB

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
500 N.E. Multnomah Street, Suite 607
Portland, Oregon 97232

December 10, 1997

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Fax: (503) 220-2480

RE: Walker Creek northern spotted owl site

Dear Mr. Chadsey:

On December 2, 1997, two representatives of the United States Fish and Wildlife Service ("Service") visited the Walker Creek northern spotted owl site at your client's invitation. The visit confirmed that the site contains nesting habitat as well as foraging or dispersal habitat for spotted owls.

Survey protocols peer reviewed by federal and state agencies, as well as scientists, biologists, and managers of private timber companies, recommend documenting that a site is vacant for three years before it is considered unoccupied. The removal of nesting habitat at the Walker Creek site, and the prey base associated with this high quality habitat, would create a risk of harm to the spotted owls which would use this site. The Service recommends that the site continue to be monitored consistent with the protocols if Boise wants to be sure it is unoccupied.

As indicated to you in previous correspondence, if your client desires certainty in this matter, it is welcome to pursue

an HCP and an incidental take permit under the ESA. This office and the Service would be pleased to provide technical assistance in this endeavor. Another option might be to pursue a land exchange with the State of Oregon, which we believe may be the best alternative for all involved parties.

For the Regional Solicitor

/s/ Steven Siegel
Steven Siegel
Attorney
U.S. Department of the Interior

APPENDIX CC

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[OCT 15 1998]

Civil No. 97-1810-JO

BOISE CASCADE CORPORATION,
Plaintiff,

v.

MICHAEL J. SPEAR, REGIONAL DIRECTOR FOR
U.S. FISH &WILDLIFE SERVICE,
Defendant.

This matter came on for hearing on defendant's motion for preliminary injunctive relief before the Honorable Robert E. Jones, United States District Judge, to enjoin and restrain plaintiff from logging a tract of timber that it owns in Clatsop County, Oregon, known as the Walker Creek Unit. On April 1, 1998, this Court issued an Opinion and Order granting the preliminary injunction request and staying the case until September 4, 1998, pending surveying. The factual findings and conclusions of law set forth in that order and the attached Factual Findings and Conclusions of Law are incorporated by reference into this decree. On September 15, 1998, this Court held a status conference to evaluate the results of the surveying. On the basis of all evidence submitted by the parties, and arguments of counsel, this Court hereby finds and concludes that defendant is entitled to a permanent injunction in this matter.

Therefore, IT IS ORDERED AND ADJUDGED that Boise Cascade Corporation, plaintiff herein, its officers, employees and agents, and all those in active concert with

them, are hereby permanently enjoined and restrained from taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA. Plaintiff's counterclaim for injunctive and declaratory relief is dismissed.

Dated Oct 15, 1998

/s/ Robert E. Jones
Honorable Robert E. Jones
U.S. District Judge

SUBMITTED BY:

/s/ Samuel D. Rauch, III
Samuel D. Rauch, III,
Of Attorneys for Defendants

APPENDIX DD

U.S. Department of Justice
Environment and Natural Resources Division

SDR
90-8-6-04291

Wildlife and Marine Resource Section
P.O. Box 7369
Ben Franklin Station
Washington, D.C. 20044-7369
Telephone (202) 305-0210
Facsimile (202) 305-0275

July 30, 1999

Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1265
Facsimile: 503-220-2480

Re: Boise Cascade Corp. v. Peterson, Civil No. 98-1538-JO (D.Or.); Boise Cascade Corp. v. Spear, Civil No. 97-1810-JO (D.Or.)

Dear Mr. Chadsey

As you are aware, the United States Fish and Wildlife Service ("FWS") has now concluded that, based upon their review of all of the information concerning the Walker Creek site over the last three years and the new survey results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property. Accordingly, the FWS has determined that an incidental take permit under the Endangered Species Act is no longer required.

In light of these determinations, the federal government would support a motion filed either by Boise Cascade or filed

jointly by Boise Cascade and the federal government to lift the present injunction. Please call me if you have any questions.

Sincerely,

/s/ Samuel D. Rauch, III
Samuel D. Rauch, III
Trial Attorney
(202) 305-0220